

**PROGRESSIVE CORPORATE LAW AS A NEW FRONTIER IN WORKERS'
CAUSE LAWYERING: THE CASE OF ISRAEL**

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ABSTRACT

This paper proposes a linkage which has not been created thus far between progressive corporate law and the cause lawyering movement in Israel. More specifically, it suggests strategies for public-interest legal organizations to pursue progressive corporate law as a new framework in workers' advocacy. Currently, the cause lawyering movement in Israel is at a crossroad: following a history of accomplishments in litigating human rights, it has recently gained a new role in representing workers. However, its achievements in this new field have so far been extremely disappointing. A case study of three leading public-interest groups analyzes high-profile workers' rights cases, which were lobbied and litigated, as well as conducting semi-structured interviews with prominent cause lawyers who were involved in these cases.

The study reveals that public-interest groups have focused on "putting out fires" in the short term, rather than on promoting workers' welfare in the long term. That is, they have addressed violations of basic rights (e.g., the right to a minimum wage), rather than coping with the broader and more fundamental problem: the widening gap in income between labor and management.

The policy recommendation presented in this paper is that cause lawyers can and should apply corporate law to engender pro-worker social change. The core premises of corporate governance shape how corporate income is distributed. Indeed, because it focuses *Maximizing Shareholder-Value*, mainstream corporate law rejects any place for workers. Nevertheless, progressive corporate law presents an alternative: it offers new models for corporations to create equitable economic growth.

Cause lawyers in Israel should use the Companies Law (1999) to litigate progressive corporate law cases. For example, under the existing provisions in this Law, managers can be held liable for dividend payments, plant relocation, and outsourcing aimed solely at benefiting shareholders at the expense of labor. Cause lawyers should also lobby for new legislation in the Knesset to introduce *Labor-Oriented Models* of the corporation, providing worker representation on the Board of Directors. The potential of implementing these strategies for cause lawyering purposes has not yet been addressed in the research literature.

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In late 2004, as I was completing my legal internship at the Association for Civil Rights in Israel (ACRI), Sharon Abraham-Weiss—one of the group’s attorneys—brought a newspaper article published in that day’s “Harretz” to my attention. The article addressed a dividend declared by a well-known Israeli company for clothing manufacturing and the effects it had on the firm’s financial situation. Upon reading the article, I wrote a letter on behalf of the ACRI to the company’s managers, calling upon them to take steps to ensure that their employees’ welfare would not be harmed. This letter and the intensive debate it provoked within the ACRI inspired me to write this thesis. I am, therefore, grateful to Sharon for bringing the article to my attention and triggering the idea of embarking on this project.

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TABLE OF CONTENTS

| | |
|---|-----------|
| INTRODUCTION | 1 |
| CHAPTER I: BACKGROUND AND DEVELOPMENT OF WORKERS' CAUSE LAWYERING | 4 |
| A. OVERVIEW OF THE PHENOMENON AND ITS ROOTS IN THE UNITED STATES | 4 |
| B. CAUSE LAWYERING AND WORKERS' ADVOCACY IN ISRAEL | 7 |
| CHAPTER II: CURRENT STRATEGIES | 13 |
| A. THE ENVIRONMENT IN WHICH WORKERS' CAUSE LAWYERS OPERATE..... | 13 |
| 1. Law and Political Economy in Israel | 13 |
| 2. Corporate Activity and its Effects on Workers | 22 |
| B. STRATEGIES ADOPTED BY PUBLIC-INTEREST LEGAL ORGANIZATIONS | 26 |
| 1. The Association for Civil Rights in Israel (ACRI) | 27 |
| 2. "Worker's Hotline" | 38 |
| 3. The Forum for the Enforcement of Workers' Rights..... | 45 |
| C. EVALUATION OF CURRENT STRATEGIES | 48 |
| CHAPTER III: SETTING THE FOUNDATIONS OF A NEW FRONTIER | 51 |
| A. WHY A NEW FRONTIER? | 51 |
| B. CAN LAW AND CAUSE LAWYERING BRING ABOUT INCOME REDISTRIBUTION? | 52 |
| 1. Law and Income Redistribution: a Dichotomy? | 52 |
| 2. Litigation: a Promise or a Disappointment? | 55 |
| C. ARE PUBLIC-INTEREST GROUPS THE SUITABLE ACTORS TO LEAD A MOVEMENT FOR INCOME REDISTRIBUTION?..... | 58 |
| 1. Public-Interest Groups in an Era of Privatization: Agents of Change or Corporate Pawns? | 59 |
| 2. Workers' Representation by Non-member Organizations (NMOs) | 62 |
| 3. Public-Interest Legal Organizations as Rights-Consciousness..... | 65 |
| CHAPTER IV: THE NEW FRONTIER: PROGRESSIVE CORPORATE LAW | 68 |
| A. WHY CORPORATE LAW FOR ALL LEGAL FIELDS?..... | 68 |
| B. WHY NOT "CORPORATE SOCIAL RESPONSIBILITY?" | 70 |
| C. MAINSTREAM CORPORATE LAW | 73 |
| D. PROGRESSIVE CORPORATE LAW AS AN ALTERNATIVE..... | 77 |
| 1. The Critique | 77 |
| 2. Toward a New Corporation? Proposed Models..... | 80 |
| E. PROGRESSIVE MECHANISMS IN THE ISRAELI COMPANIES LAW (1999) | 88 |
| 1. The Framework: Section 11(a) and the Purpose of the Corporation | 88 |
| 2. Section 6: Lifting the Corporate Veil..... | 92 |
| 3. Sections 192(a) and 193(a): Rights and Obligations of Shareholders | 96 |
| 4. Sections 252-254: Duty of Care and Fiduciary Duty..... | 97 |
| 5. Sections 302-303: Distribution of Capital | 99 |

| | |
|---|------------|
| CONCLUSION: RECOMMENDED STRATEGIES | 102 |
| APPENDIX A - METHODOLOGY | 106 |
| APPENDIX B - INTERVIEW PROTOCOL..... | 107 |
| BIBLIOGRAPHY | 109 |

INTRODUCTION

The cause lawyering movement in Israel is currently at a crossroad. Following accomplishments in litigating human rights, it has recently gained a new role in representing workers. This new role has primarily been the result of a dramatic decrease in union density over the past few decades. Yet, a case study of three leading public-interest groups (The Association for Civil Rights in Israel, the “Worker’s Hotline,” and the Forum for Enforcement of Workers’ Rights) indicates that the effectiveness of the strategies pursued by these groups has so far been extremely disappointing. The cases which these groups have lobbied and litigated on labor issues have not engendered pro-worker changes in the law or in the society. Therefore, this paper analyzes this failure, suggesting a new approach: progressive corporate law.

Workers’ cause lawyers should acknowledge the fact that violations of basic workers’ rights (e.g., the right to a minimum wage) are merely the symptoms of a much more fundamental illness. In fact, it is *corporate income inequality* that poses the most serious threat to the well-being of workers in the long-term. Israel is not unique in this landscape: wide-scale privatization in many industrialized economies has made corporations more profitable than ever: the globalization of markets has enabled them to further lower their labor costs. Consequently, labor’s income share has decreased due to the inequitable allocation of corporate wealth, mass layoffs, plant relocations and outsourcing.

The root of the problem is the traditional corporate structure. More specifically, the fundamental weakness of corporate workers is inherent in mainstream corporate law. The *Shareholder Primacy Model* and the ethos of *Maximizing Shareholder-Value* preclude any meaningful place for workers in corporate governance. Legal rules allow corporations to treat workers as just another commodity to increase shareholder profit.

Nevertheless, progressive corporate law presents an alternative: it creates new mechanisms for workers’ participation in decision-making and for a more equal distribution of corporate income. To effect this change, progressive

corporate law scholars—most of whom are American—have developed concrete models, ranging from *Other-Constituency Laws* to *Labor-Oriented Models* to the *Pluralist Board of Directors*, which redefine both the purpose of the corporation and its legal structure to promote social justice.

Based on these models, the policy recommendation presented in this paper is that cause lawyers can and should apply progressive corporate law to engender pro-worker social change in Israel. In fact, even today, Israeli corporate law includes several provisions which can be pursued by workers' cause lawyers. Most importantly, Section 11(a) of the Companies Law (1999) provides the framework for this pursuit: according to this Section, the purpose of the company should be to serve the interests of its various stakeholders, including employees.

Additional progressive mechanisms in this law relate to *Veil Piercing* (lifting the corporate veil to hold shareholders and managers personally liable for the company's mismanagement), *Fiduciary Duties* (placing responsibility on corporate decision-makers for violating the duties of care and loyalty), and *Capital Distribution* (allowing workers' standing in courts to oppose dividend payments or capital reduction).

This paper suggests strategies for worker's cause lawyers to pursue these mechanisms within a new framework for workers' welfare. It addresses the dilemmas and obstacles they may encounter and suggests ways to resolve them. The paper is organized as follows:

Chapter I provides an overview of the background and development of the movement for workers' cause lawyering. It focuses on both the "homeland" of this movement, the United States, as well as on the Israeli case.

Chapter II examines the current strategies pursued by public-interest legal organizations on labor issues in Israel. It first addresses the environment in which workers' cause lawyers operate by describing the political economy of Israel, corporate activity, and its effects on workers during the past several decades. The chapter then analyzes the strategies embodied in cases which became the "flagships" of public-interest litigation and lobbying on workers' rights issues.

Finally, the chapter provides a critical evaluation of the effectiveness of these strategies in promoting workers' welfare.

Chapter III sets the foundations of a new frontier for public-interest strategies. It explains why a new frontier is essential and addresses the ongoing debate regarding the law's capability of promoting social change. On this point, the chapter takes a realistic approach, according to which changing legal rules is essential, because it affects how power relations are bargained and income is distributed. The chapter also addresses the key dilemmas which public-interest organizations are bound to encounter when pursuing a new frontier: (1) their dependence on private funding which might invite donors' interference; (2) workers' representation by groups which are non-member organizations (NMOs); (3) the function of rights-consciousness actors in pursuing a corporate-labor agenda.

Chapter IV presents the heart of the new frontier—progressive corporate law. It opens by explaining why corporate law is the appropriate legal field for workers' cause lawyers to pursue. It then distinguishes progressive corporate law from the movement for "Corporate Social Responsibility" (CSR), showing that CSR implies more danger than hope for social change. The chapter continues to describe the debate between mainstream and progressive corporate law and focuses on presenting the key features of the latter movement. It then suggests concrete mechanisms in the Israeli Companies Law to be pursued progressively.

Finally, the study concludes by recommending strategies for public-interest groups to adopt based on the ideas explored. It proposes new possibilities for workers' cause lawyers to lobby in the Knesset (the Israeli Parliament) for new legislation and litigate in courts.

CHAPTER I
BACKGROUND AND DEVELOPMENT OF WORKERS' CAUSE
LAWYERING

A. OVERVIEW OF THE PHENOMENON AND ITS ROOTS IN THE UNITED STATES

Workers' cause lawyering is a relatively new phenomenon. It has developed primarily in recent years, representing a new stage in lawyers' engagement with social movements. Therefore, in order to understand the context of this new phenomenon, we should first explore its historical background and development. For this purpose, we begin by defining the terminology. This paper refers to the concept of "cause lawyering;" however, it also encompasses the terms "public-interest lawyering" and occasionally even "lawyering for social change." Each of these concepts refers to basically the same phenomenon. Thus, after providing a relatively short overview of their meanings, I will use these three terms interchangeably when referring to the general phenomenon as well as to organizations and lawyers functioning in the field.

What is cause lawyering? It refers to a social and legal movement in which lawyers do not serve as their clients' "hired guns," but rather pursue a public cause—often political or ideological—and are morally committed to its promotion through lobbying, litigation, and/or other kinds of advocacy. In fact, many scholars have engaged in defining the concept of cause lawyering and its unique characteristics within the legal profession.¹ For example, Sarat and Scheingold write:

What distinguishes the morally activist lawyer is that she . . . elevates the moral posture of the legal profession beyond a crude instrumentalism in which lawyers sell their services without regard to the ends to which those services are put. . . Cause lawyering. . . is frequently directed at altering some aspect of the social, economic and political status quo. Because it gives priority to political ideology, public policy and moral commitment, cause lawyering

¹ See Generally Ann Southworth, *Conservative Lawyers and the Contest Over the Meaning of 'Public Interest Law,'* 52 UCLA L. REV. 1223 (2005).

often attenuates, or transforms, the lawyer-client relationship—a cornerstone of the established conception of professional responsibility. Serving the client is but one component of serving the cause.²

Obviously, serving social and ideological causes through lawyering is not without a political context. However, this context has increasingly been the subject of controversy in the homeland of cause lawyering—the United States. Indeed, for most of its history, American cause lawyering has been identified with the liberal-left: Southworth notes that by the time the term "public interest law" first appeared in the late 1960s, it was associated almost exclusively with liberal causes.³ An illustration of this close association can be found in Aron's definition of public-interest law as—

Efforts to provide legal representation to interests that historically have been unrepresented or underrepresented in the legal process...many significant segments of society are not adequately represented in the courts...because they are either too poor or too diffuse to obtain legal representation in the marketplace.⁴

During the 1960s and 1970s, the cause lawyering movement actually meant challenging traditional legal concepts, frequently identified with conservative politics. Public-Interest lawyers engaged not only in constitutional litigation, but also applied other strategies, such as administrative and legislative advocacy. They promoted primarily civil and political rights, focusing on struggles against racial segregation and supporting equal rights for African-Americans and other minority groups.

With the rise of the Welfare Rights Movement during the 1960s, cause lawyering broadened its fields of activity to social and economic rights. It began pursuing what was then a new legal framework: poverty law.⁵ Subsequently, an "aggressive" model of lawyering grew out of the civil rights movement, seeking

² CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES, 3-4 (Austin Sarat and Stuart Scheingold eds., 1998).

³ Southworth, *supra* note 1, at 1124.

⁴ NAN ARON, LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980S AND BEYOND (1989).

⁵ Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 209-18 (1976).

to use the same tools applied to civil and political rights (e.g., impact litigation, lobbying and administrative advocacy) to achieve legal reforms benefiting the poor.⁶ Such reforms were actually accomplished, the most famous being the creation of the State legal aid services. Moreover, cause lawyering became a label for “moral superiority over attorneys who represented private clients—particularly corporate clients—in conventional practices.”⁷

However, by the mid-1970s, a conservative wing of cause lawyering emerged as a reaction to the liberal legal movement, focusing on opposing the government regulation of business. Since that time and throughout the past three decades, conservative and libertarian lawyers have established legal advocacy organizations, supported primarily by business groups, and have adopted the model and rhetoric of liberal cause lawyering. As a result, liberal and conservative public-interest groups have been competing in courts and in the public opinion over the meaning of “public-interest law.”⁸

The rise of neo-liberalism in the 1980s, and the anti-welfare policies which accompanied it, resulted in a crisis in the social and economic rights movement. Liberal cause lawyers were blocked by the Supreme Court as well as by the government and the legislature, and their pursuit of a social agenda reached its lowest point.⁹

This new conservative reality signaled the emergence of new approaches developed by scholars and practitioners who felt discouraged in light of their failures to advance progressive causes. For example, the movement for Community Economic Development (CED), inspired primarily by the work of William Simon, was one of the most prominent of these new approaches. It suggested that cause lawyers should work to assist poor communities develop

⁶ Southworth, *supra* note 1, at 1128.

⁷ *Id.* at 1230.

⁸ *Id.*

⁹ Robert Fischer, *Community Organizing in the Conservative '80s and Beyond*, 25 SOC. POL'Y 11 (1994).

their own economic infrastructure, built on the private sector rather than on the government to establish small businesses and local services institutions.¹⁰

Lawyering for the cause of workers is another recent development in the public-interest movement. In their introduction to “*Emerging Labor Market Institutions for the Twenty-First Century*,”¹¹ Freeman and Hersch describe the emergence of workers’ cause lawyering in the United States, where union density has fallen into single digits in the private sector, weakening the collective voice of workers even more.¹² Facing yet another consequence of neo-liberalism, activists and workers have formed new organizations to perform some of the functions traditionally carried out by trade unions. In addition, existing legal groups, which have a long history of workers’ representation, have also found themselves increasingly engaged in workers’ representation.¹³

Yet, workers’ cause lawyering in the United States is only taking its first steps. One can hardly see it as a widespread phenomenon taking place in this country. Therefore, we will now address a case in which this phenomenon has grown to become nothing less than a key component in the public-interest movement in recent years: the case of Israel.

B. CAUSE LAWYERING AND WORKERS’ ADVOCACY IN ISRAEL

The public-interest movement in Israel has essentially grown as an adaptation of the American model. It started by addressing civil and political rights, primarily of minority groups and women, and developed into a welfare agenda. In recent years, it has gained a central role in workers’ advocacy. However, in contrast to the United States, the political agenda of the Israeli

¹⁰ WILLIAM H. SIMON, *THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS, AND THE NEW SOCIAL POLICY* (2001); Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399 (2001); Scott L. Cummings, *Recentralization: Community Economic Development and the Case for Regionalism*, 8 J. SMALL & EMERGING BUS. L. 131 (2004).

¹¹ *EMERGING LABOR MARKET INSTITUTIONS FOR THE TWENTY-FIRST CENTURY* (Richard B. Freeman, Joni Hersch, and Lawrence Mishel eds., 2005).

¹² *Id.* at 1-2.

¹³ *Id.* at 5-9.

movement has been a distinctively liberal one. Thus far, there has been almost no conservative public-interest organization in the country.

How did it all start? In 1972, a group of Israeli lawyers and scholars established the Association for Civil Rights in Israel (ACRI).¹⁴ This was actually the instant at which the Israeli human rights movement was born. Soon after its creation, the ACRI became the most prominent public-interest legal organization in Israel, leading the way for cause lawyers as well for other groups in the country to engage in advocacy for social change.

The ACRI has remained the leading human rights group even today, employing the biggest legal staff dedicated to public-interest lobbying and litigation (about 20 attorneys, lawyers and field researchers are working in the group's legal department); with the widest scope of human rights issues being addressed (ranging from citizenship to due process to public housing); and enjoying the highest prestige given to a human rights group both within the legal system¹⁵ and in public opinion. Indeed, it has often been described as “the Israeli ACLU.”¹⁶

However, it was not until the late 1980s that other public-interest groups entered the Israeli public arena to play a central role in its legal system. Thereafter, numerous groups have been engaged in lobbying, advocacy and litigation, especially in cases of human rights violations.¹⁷ Initially, and for a

¹⁴ For more information about the ACRI, see <http://www.acri.org.il/>.

¹⁵ Most of the ACRI's presidents have been former justices of the Israeli Supreme Court or leading legal academics. See NAAMA YESHUVI, HUMAN RIGHTS, THAT IS ALL: THE ASSOCIATION FOR CIVIL RIGHTS SO FAR (2002) (Hebrew).

¹⁶ The ACRI has often been described by the Israeli press as the leading group for human rights in the country, representing the “mainstream” view on these issues. However, in recent years, several articles have also addressed the increasing controversies within the ACRI regarding its agenda, which caused it to adopt positions less identified with the political consensus. See Yuval Yoaz, *Off to the HCJ*, HAARETZ MAGAZINE, January 7, 2005 (Hebrew); Aviv Lavi, *The Politics of the Victim*, HAARETZ MAGAZINE, January 17, 2003 (Hebrew); Uzi Roshe, *Finally, Outside the Consensus*, HAARETZ, February 6, 2002 (Hebrew).

¹⁷ These groups rely primarily on the financial support of Israeli and international private foundations. Much of this support has been provided by the New Israel Fund, an international partnership of Israelis, Americans, Canadians and Europeans, which was founded in 1979 to support and fund social change organizations and advocacy groups in Israel. For an overview of the Israeli public-interest movement see Neta Ziv, *Lawyers Talking Rights and Clients Breaking Rules: Between Legal Positivism and Distributive Justice in Israeli Poverty Lawyering*, 11 CLINICAL L. REV. 209 (2004).

relatively long period of time, this movement focused on protecting the rights of Palestinians in the Occupied Territories and promoting civil and political rights in Israel – e.g., freedom of speech and political association.

Most of the accomplishments achieved by the Israeli human rights movement throughout the 1980s and onward were the result of petitions to the High Court of Justice (HCJ) launched by public-interest groups, primarily by the ACRI.¹⁸ These included the recognition of certain civil and political rights for Arabs in Israel, protections provided for freedom of speech, press and religion, matters of due process and rights in criminal procedure, and the abolition of the torture of Palestinians.¹⁹

The agenda behind these campaigns has been a liberal one. Many lawyers joined the public-interest community after receiving their training in the United States as part of a program designed by the New Israel Fund.²⁰ This program included one year of study for an LL.M at the American University in Washington D.C., accompanied by practical training in leading American public-interest groups, followed by one year of work at an Israeli public-interest organization.²¹

Hence, similar to their colleagues and trainers at the ACLU and other American public-interest groups, Israeli cause lawyers saw being committed to a perception of civil liberties as a crucial component of the democratic system. This was their ideology: an ideology which did not take sides in Israeli politics, but rather presented itself as being nonpartisan and free from commitment to any particular political wing or party. Yet, there is no doubt that the public-interest

¹⁸ Yeshuvi, *supra* note 15.

¹⁹ See Neta Ziv, *Human Rights Law and Public Interest Lawyering: A Study on the Interdependence of Jurisprudence and the Legal Profession in Israel* (unpublished J.S.D. Dissertation, Stanford Law School) (on file with University Archives, Stanford University); Neta Ziv, *Lawyering for the Public Interest: Who is the Public? What is the Interest? Professional Dilemmas in Representing Minority Groups in Israel*, 6 HAIFA UNIV. L. REV. 149 (2001) (Hebrew); Neta Ziv and Ronen Shamir, *Politics and Sub-Politics in the Struggle against Land Discrimination*, 16 THEORY AND CRITICISM 45 (2000) (Hebrew).

²⁰ <http://www.nif.org/>.

²¹ Yuval Yoaz, *The Constitutional Revolution of the New Israel Fund*, HAARETZ, May 25, 2004 (Hebrew).

legal movement in Israel has been—and still is—highly identified with the political liberal-left.

Only in the late 1990s did public-interest legal organizations begin to address social and economic rights, e.g. welfare, housing, education and health.²² Neta Ziv, the leading public-interest law scholar in Israeli academia, argues that the new social rights agenda signaled a real change in the overall interest of public-interest groups, turning poverty into a central theme in rights advocacy.²³

Toward the beginning of the 2000s, as the daily practices of workers' exploitation became extremely common, public-interest groups began to address workers' issues. This was, naturally, accompanied by the ongoing weakening of trade unions, especially of the Histadrut—Israel's largest union—which has occurred over the past few decades.

The first major organization to focus on workers' rights—the “Worker's Hotline” (“Kav La'Oved”)²⁴—was established as early as 1991 to protect Palestinian workers of the Occupied Territories. Beginning in the late 1990s, the “Worker's Hotline” has represented not only Palestinians, but also thousands of Israeli and migrant workers in individual cases litigated in Labor Courts. It has also been engaged in advocacy at the public level: petitioning the HJC on constitutional issues, lobbying for legislation in the Knesset and for policy change by the government.

Gradually, but increasingly, other Israeli public-interest groups have also begun to litigate labor and employment law cases.²⁵ For example, ACRI has

²² The organizations operating in this field include: The ACRI (*supra* note 14); “Adalah”—The Legal Center for Arab Minority Rights in Israel (<http://adalah.org/>); “Community Advocacy” (<http://advocacy.org.il/>); The Israel Women's Network (<http://www.iwn.org.il/>); “Itach”—Women Lawyers for Social Justice (<http://itach.org.il/>); “Hotline for Migrant Workers” (<http://www.hotline.org.il/>); “Mechuyavut” – Commitment for Peace and Social Justice (<http://www.commitment.org.il/>); “Physicians for Human Rights” (<http://phr.org.il/>); “Worker's Hotline” (<http://www.kavlaoved.org.il/>); “Worker's Voice” (“Saut El-Amel”—no website); “Yedid” (<http://www.yedid.org.il/>).

²³ Ziv, *supra* note 17, at 219; Neta Ziv, *Water Poverty in Israel: Human Rights and Distributive Justice*, 14(3) THE JOURNAL OF WATER LAW 150 (2003); Neta Ziv, *The Rich, The Poor and the Bridge: Five Stories about Disadvantage and the Legal System*, 1 MISHPAT NOSAF 81 (2001).

²⁴ *Supra* note 22.

²⁵ Other extremely active participants in workers' advocacy are clinical programs within Israeli law schools, primarily the Clinical Legal Program for Law and Welfare at Tel Aviv University Faculty of Law (<http://www.tau.ac.il/law/clinics/>). However, the activity of such programs is a

represented women and gay workers in cases of employment discrimination. In 2004, it decided to focus on workers' rights as a part of its engagement with social and economic rights. Subsequently, it has filed several lawsuits in the Labor Court on behalf of workers and is currently working on a comprehensive report on the situation in the Israeli labor market.²⁶

Furthermore, the "Hotline for Migrant Workers" and "Physicians for Human Rights (PHR)," together with the "Worker's Hotline," have become the publicly acknowledged representatives of disadvantaged populations, such as migrant and contract workers.²⁷ Women organizations, such as "The Israel Women's Network" and "Itach – Women Lawyers for Social Justice," have represented women workers in cases involving employment discrimination and deprivation of social security benefits.

Additional groups also adopted strategies aimed at representing workers. For example, "Commitment for Social Justice and for Peace" opened a legal aid center for the unemployed and has represented workers participating in the governmental welfare reform program since 2005.²⁸ The "Worker's Voice" ("Saut El-Amel") has initiated advocacy programs for Israeli-Arab workers in Northern Israel.

In the early 2000s, several groups formed a coalition entitled "The Forum for the Enforcement of Workers' Rights." This coalition is not an official organization, but rather a framework within which these groups can join forces and act together to promote workers' issues they identify as being crucial, especially by lobbying for legislation in the Knesset as well as for government

subject for a separated report. In this framework the work of the Tel Aviv clinic will be described only as part of the activity conducted by the Forum for the Enforcement of Workers' Rights, which will be addressed in Chapter II.

²⁶ See the ACRI's website, *supra* note 14.

²⁷ Rivaka Rajzman and Adriana Kemp, *State and Non-State Actors: A Multi-Layered Analysis of Labor Migration Policy in Israel*, in *THE POWER OF PROPERTY: ISRAELI SOCIETY IN THE GLOBAL AGE 222* (Dani Filc and Uri Ram eds., 2004) (Hebrew); Adriana Kemp and Rivaka Rajzman, *Foreigners in a Jewish State—The New Politics of Labor Migration in Israel*, 3(1) *ISRAELI SOCIOLOGY* 79 (2000) (Hebrew).

²⁸ For an overview of the "Wisconsin Works Program," named after the model implemented in the State of Wisconsin, U.S.A., in 1997, see SHLOMO SWIRSKY, AMI FRENKEL AND BARBARA SWIRSKY, *INCOME MAINTENANCE IN ISRAEL: FROM WELFARE ALLOWANCES TO INCOME MAINTENANCE TO THE 'WISCONSIN PROGRAM,'* (Adva Center for Information on Equality and Social Justice in Israel, 2001) (Hebrew).

and administrative policy. In fact, this forum has, indeed, initiated several legislative bills and amendments to laws, which will be described later.

Therefore, we can see that in recent years, public-interest legal organizations have established their status as prominent actors in workers' advocacy. Unavoidably, this new trend has raised various dilemmas and difficulties. However, a substantive discussion of the functioning of public-interest groups in this process, as well as the barriers they encounter in pursuing their goals, has not yet been conducted. Therefore, in the following chapters we will address both the current strategies adopted by these organizations and the dilemmas they face in pursuing them.

CHAPTER II

CURRENT STRATEGIES

A. THE ENVIRONMENT IN WHICH WORKERS' CAUSE LAWYERS OPERATE

1. Law and Political Economy in Israel

From its establishment in 1948 until recently, Israeli citizens have enjoyed an extremely progressive labor and welfare system. This system was based on two major factors: first, a series of cogent labor laws,²⁹ which established the country's industrial relations and provided strong protection for workers. Second, a series of social laws,³⁰ which formulated a strong security network for the poor. Both of these factors were feasible due the political power of the Israeli labor movement and especially the key role played by the Histadrut (the largest trade union) in the early years of Israel.³¹

The Israeli labor movement, with the "Mapay" party at its center, ruled the Zionist movement and later the state of Israel from the early 20th century until 1977. This movement was influenced by European socialism and for many years

²⁹ Among them were the Annual Leave Law (1951), The Working Hours Law (1951), The Youth's Work Law (1953), The Women's Work Law (1954), The Collective Bargaining Agreements Law (1957), The Labor Disputes Resolution Law (1957), The Wage Protection Law (1958), The National Employment Service Law (1959), The Severance Pay Law (1963), and the Labor Court Law (1969).

³⁰ In 1953, the National Insurance Law was enacted, introducing most of the rights concerning social security, ranging from disability allowance to unemployment benefit to workers' allowance in an event of bankruptcy. During the 1960s and the 1970s, welfare law was developed primarily by the Labor Courts, which the welfare laws have been part of their subject matter jurisdiction. Thus, these courts interpreted the various welfare statutes, frequently from a progressive perspective, and applied them to additional situations that were not explicitly mentioned in the text of those statutes. In 1980, the social security legislation was completed with the enactment of the Income Maintenance Law. This law provides Israeli residents who are unable to work, or whose income is extremely low, and who are not entitled to any other social security benefit, with a small monthly allowance based on a timely evaluation of their ability to work. The Income Maintenance Law therefore serves as the final line of defense of the welfare state. Finally, in 1994, the National Health Insurance Law (NHIL) was enacted. This law determined for the first time the right of every Israeli resident to have a health insurance covered by the state. *See* Guy Mundlak, *50 Years to the National Insurance Law: The Celebrations Will take Place in the Courtroom*, 67 SOC. SECURITY 83 (2004) (Hebrew).

³¹ MICHAEL SHALEV, *LABOUR AND THE POLITICAL ECONOMY IN ISRAEL* (1992).

presented a fascinating—yet some argue failing—attempt to combine socialism with Zionist nationalism.³² Established in 1920, the leaders of the labor movement created the Histadrut to participate in the Zionist nation-building project in Palestine. Its main purpose was to push Palestinian workers out of the labor market and to allow Jewish immigrants to take their place.³³

Prior to the establishment of Israel, the Histadrut also served as the main institution of the “Yishuv” (the Jewish community in Palestine) to build the economic infrastructure of the emerging state. Toward the end of the British mandate over Palestine, the Histadrut was the most powerful agent in the economy of Palestine. As a result, with the establishment of Israel, the Histadrut owned most of the enterprises controlled by the state.³⁴

Both the Histadrut and the labor government saw themselves as serving the same national goals and being part of the same political movement. Thus, labor and welfare issues were determined through collective bargaining between the state and the Histadrut, with very few differences of opinion. The Histadrut actually proposed and drafted labor and welfare laws: they were negotiated with the government and were passed by the Knesset, in which the Labor Party enjoyed a clear majority. These laws reflected the strong ideological notion of a collectivist-socialist society.³⁵

However, throughout this period, the Labor Party, in fact, operated as an elitist party, identified first and foremost with the powerful groups in the Israeli society and discriminating against disadvantaged groups, such as the Palestinians and Oriental Jews, for many years. In his famous book, *Nation-Building or a New Society?*³⁶ Sternhell argues that the Israeli political and legal regime was not

³² Michael Shalev, *The Labor Movement in Israel: Ideology and Political Economy*, in, THE SOCIAL HISTORY OF LABOR IN THE MIDDLE EAST (E.J. Goldberg ed., 1996); ANITA SHAPIRA, BERL (1980) (Hebrew).

³³ Guy Mundlak, *Institutions of Workplace Democracy* (January 1995) (unpublished S.J.D. Dissertation, Harvard Law School) (on file with Harvard Law School Library).

³⁴ SHIMSHON BICHLER AND JONATHAN NITZAN, FROM WAR PROFITS TO PEACE DIVIDENDS THE GLOBAL POLITICAL ECONOMY OF ISRAEL 140-146 (2001) (Hebrew).

³⁵ INSTITUTIONS OF WORKPLACE DEMOCRACY, *supra* note 33.

³⁶ ZEEV STERNHELL, *NATION-BUILDING OR A NEW SOCIETY?* (1995) (Hebrew). For the English version of this book, see ZEEV STERNHELL, *THE FOUNDING MYTHS OF ISRAEL: NATIONALISM, SOCIALISM, AND THE MAKING OF THE JEWISH STATE* (1998).

really socialist, but rather nationalist and capitalist to begin with. According to his analysis, the labor movement was concerned with nation-building, not with social change.

In 1977, the Labor Party lost the elections for the first time in Israeli history to the right-wing “Likud” party. The Labor Party was described as a corrupt, semi-Bolshevik movement, whereas capitalism was presented by the new “Likud” government as the cure for all of Israel’s ills. For most Israelis, capitalism symbolized hope for a new future far removed from the old socialist background of the elitist Labor Party. Many Israelis also hated the Histadrut for its strong connection to the Labor Party.³⁷

However, returning to Sternhell’s analysis of the “hidden” history of the labor movement, the shift from socialism to capitalism can be understood more as issue of image rather than of substance. Capitalism, in fact, was always a key feature of Israeli society.

In the years following its 1977 triumph, the “Likud” government focused on the liberalization of the capital market and on the privatization of governmental companies as its main economic policy. However, even the Labor Party—which was now an opposition party—accepted this new policy. Subsequently, in the elections that followed, both the “Likud” and the Labor Party promised to continue policies of liberalization and privatization. One could say that capitalism became the official *bon ton* in Israeli politics. Its popularity was unquestioned.³⁸

In 1984, following an economic crisis due to high inflation, a new government was elected in Israel. The two leading parties—the center-right “Likud” and the center-left Labor Party—formed a unity coalition government. Shortly after its creation, this government issued an “Economic Emergency Plan” to address the high inflation rates.³⁹ The plan introduced a series of social and

³⁷ URI RAM, *THE GLOBALIZATION OF ISRAEL, MCWORLD IN TEL AVIV, JIHAD IN JERUSALEM* (2005) (Hebrew).

³⁸ Bichler and Nitzan, *supra* note 34.

³⁹ D. NACHMIAS AND A. KLEIN, *THE ECONOMIC ARRANGEMENTS LAW: BETWEEN ECONOMY AND POLITICS* (The Israel Democracy Institute, 1999) (Hebrew); SHLOMO SWIRSKY, *THE GATS*

economic measures which were all with accordance to what is referred to as “the Washington Consensus:” wage freezes, privatization, fiscal policy discipline, deregulation, low taxes and liberalization of trade laws.⁴⁰

Indeed, the “Economic Emergency Plan” of 1985 announced the arrival of neo-liberalism to Israel, a notion often identified with the conservative social-economic policy led by Ronald Regan in the U.S.A. and Margaret Thatcher in the U.K. in the 1980s.⁴¹

Since the mid-1980s, neo-liberalism has changed the face of Israel. Privatization has become the key component of the Israeli political economy.⁴² A sharp decline in organized labor has weakened the power of trade unions to organize and represent workers: while until the 1980s over 80% of Israeli workers were represented by the Histadrut their rate dropped to about 40% in the late 1990s.⁴³ In fact, some populations of workers—especially Palestinian and international migrant workers—were not represented by the Histadrut at any stage.⁴⁴

Neo-liberalism has become the consensus in Israeli politics and society. All the Israeli governments since 1985 have adopted its guidelines as their economic policy, and all the political parties—excluding the small non-Zionist parties on the far left—have incorporated it as part of their agenda. It came to represent the shift from Israel’s original collectivist-socialist agenda to its new individualist-capitalist approach.⁴⁵ In times of crisis, popular politicians from both sides of the political spectrum often argue that “the reason for the weakness

AGREEMENT AND THE PUBLIC SERVICES IN ISRAEL (Adva Center for Information on Equality and Social Justice in Israel, 2003) (Hebrew).

⁴⁰ Robert J. Samuelson, *The Spirit of Capitalism*, FOREIGN AFFAIRS, January/February 2001.

⁴¹ Fischer, *supra* note 9.

⁴² Filc and Ram, *supra* note 27; Ram, *supra* note 37.

⁴³ Yinon Cohen, Yitshak Haberfeld, Guy Mundlak and Ishak Saporta, *Unpacking Union Density: Union Membership and Coverage in the Transformation of the Israeli Industrial Relations System*, 42(4) INDUSTRIAL RELATIONS 692 (2003).

⁴⁴ Guy Mundlak, *Neither Insiders nor Outsiders: The Contractual Construction of Migrant Workers’ Rights and the Democratic Deficit*, 27(2) TEL AVIV UNIV. L. REV. 423 (2003) (Hebrew); Guy Mundlak, *Power-Breaking or Power-Entrenching Law? The Regulation of Palestinian Workers in Israel*, 20 COMP. LAB. L. & POL’Y J. 569 (1999).

⁴⁵ MENACHEM MAUTNER, *THE DECLINE OF FORMALISM AND THE RISE OF VALUES IN ISRAELI LAW* (1993) (Hebrew).

of our economy is its socialist roots” and that “we are now paying for the mistakes made by the leaders of ‘Mapay’ as part of their socialist ideology.”⁴⁶

In 1992, two new basic laws were passed in the Knesset, in what was later referred to as “the Constitutional Revolution” by the Chief Justice of the Israeli Supreme Court, Aharon Barak. The first of these new laws was Basic Law: Human Dignity and Liberty, and the second, Basic Law: Freedom of Occupation. These basic laws introduced a set of human rights to the Israeli written Constitution for the first time, which until then were acknowledged primarily by the HCJ in its rulings throughout the years.⁴⁷ However, these basic laws have focused on civil and political rights as well as on property rights.

The absence of social, economic and cultural rights from the written Israeli Constitution has since been a matter of great controversy among Israeli lawyers and scholars.⁴⁸ In 2000, the HCJ recognized the right to a minimum subsistence level protected by the Basic Law: Human Dignity and Liberty, but ruled that this right applied only to the “minimum core” to which every human being is entitled in order to exist.⁴⁹ As will be described later, various Israeli scholars today view this “Constitutional Revolution” of 1992, and the patterns of judicial review adopted by the HCJ since, as yet another stage in the formulation of a neo-liberal market economy in Israel.

In 2001, the unity coalition government, which was once again established by the “Likud” and the Labor Party and was headed by Ariel Sharon, initiated a comprehensive welfare reform. The government declared that the increase in the number of income maintenance receivers during the 1990s not only threatened the national budget, but also reflected the tendency of many Israelis to prefer to receive welfare rather than to obtain a job. Therefore, the government decided to

⁴⁶ Yishai Variet and Michal Kapra, *Its All Ben Gurion's Fault (Interview with Israeli Finance Minister Binyamin Netanyahu)*, MAARIV July 18, 2003 (Hebrew); Moti Basuk, *Prime Minister Sharon after a Meeting with Economists: 'A Practical Plan for Reducing Poverty Should be Devised Soon*, WALLA NEWS November 20, 2005 (Hebrew).

⁴⁷ AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* (Translation by Sari Bashi, 2005).

⁴⁸ ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ISRAEL (Yuval Shani and Yoram Rabin eds., 2004) (Hebrew).

⁴⁹ C.A. 4905/1998 *Gamzu v. Yishayahu* P.D. 55(3) 360.

change the welfare system by offering a wide-scale cut in the social security network.

Subsequently, between 2001 and 2004 the Knesset passed a series of laws substantially reducing basic welfare benefits, ranging from income maintenance allowances to old age allowances to disability allowances.⁵⁰ For example, these laws cut 10% to 30% of the income maintenance allowance, leaving a couple with two children with a monthly income of NIS 2,333 (about \$520), which is 33.5% of the average wage.⁵¹ Interestingly, these cuts were described as “harsh” by the government officials who participated in their formulation.⁵²

Several public-interest groups petitioned the HCJ in three cases raising fundamental questions regarding the welfare reform. They challenged the violation of basic rights they have identified as incorporated in the reform.⁵³ For example, the ACRI and “Commitment for Social Justice and Peace” represented two claimants in their petition to the HCJ: a single mother with two children, 36, receiving a monthly income maintenance allowance of NIS 2,744 (about \$610) due to the reform; and a man, 53, unemployed, receiving a monthly allowance of NIS 1,587 (about \$350) also due to the reform.

The HCJ rejected all three petitions. It decided that the court should not interfere with government decisions on social and economic policy and that the reform did not violate the right to a minimum subsistence level, protected by the Basic Law: Human Dignity and Liberty.

These decisions made by the HCJ reflected its interpretation of the Israeli Constitution in ways that have legitimized Israeli neo-liberalism, and in fact participated in its incorporation into society. Even before these decisions, several

⁵⁰ Mundlak, *supra* note 30.

⁵¹ These numbers are taken from the ACRI’s petition opposing the reform: H.C.J. 366/2003 “*Commitment to Peace and to Social Justice*” *et al v. The Minister of Finance* (published, December 12, 2005).

⁵² Ruthi Sinai, *We Came Out With Choked Throats*, HAARETZ, August 30, 2005 (Hebrew).

⁵³ H.C.J. 5578/2002 *Rachel Manor et al v. Minister of Finance*, P.D. 59(1) 729 (challenging the cut in the Old Age Allowances); H.C.J. 494/2003 *Physicians for Human Rights et al v. Minister of Finance* (unpublished, December 9, 2004) (challenging the denial of social security rights applied to migrant workers); H.C.J. 366/2003 “*Commitment to Peace and to Social Justice*” *et al v. The Minister of Finance* (*supra* note 51) (challenging the cut in the Income Maintenance Allowance).

Israeli scholars had pointed to neo-liberal trends in the rulings of the HCJ throughout the 1990s and 2000s.

For example, Gross argues that the “Constitutional Revolution” of 1992 did not serve as a tool for social justice, but rather as a tool to establish the right to property.⁵⁴ This, according to Gross, was different from the process which occurred in another country which adopted a new Constitution at the same time: South Africa. The ethos that surrounded the new South African Constitution, Gross argues, was distributive justice and reconciliation, whereas the Israeli ethos focused on liberalization and capitalism.⁵⁵

In his work on the globalization of the Israeli economy, Ram describes how privatization and the collapse of the Israeli welfare state were made legally possible by the constitutional interpretation led by the HCJ in the 1990s.⁵⁶ This interpretation, according to Ram, emphasized property and the contractual rights of businesses and employers, but failed to specify rights which would have protected the poor. Ram writes:

...[t]he court is much more concerned about strengthening the individual’s rights and property than about creating a public space and collective rights aimed at limiting the powers of the market and not only the power of the state. In fact, the court operates to establish a constitutional sphere which will serve as the infrastructure for corporate capitalism and the business ethics it requires.⁵⁷

In his essay on law and privatization, Peleg notes that the attitude of the Supreme Court is pro-privatization. Its perception can be characterized primarily by its lack of interference, i.e. by its judicial passiveness.⁵⁸ Peleg mentions the approaches of additional Israeli scholars: for example, Mundlak believes that “the essence of the Constitutional Revolution will be translated into a revolution for

⁵⁴ Aeyal M. Gross, *The Israeli Constitution: A Tool for Distributive Justice, or A Tool Which Prevents It?* DISTRIBUTIVE JUSTICE IN ISRAEL in (Menachem Mautner and Ronen Shamir eds., 2000) (Hebrew).

⁵⁵ Aeyal M. Gross, *The Constitution in Reconciliation and Transitional Justice: Lessons from South-Africa and Israel*, 40 STAN. J INT’L L. 47 (2004).

⁵⁶ Ram, *supra* note 37.

⁵⁷ *Id.* at 41-42.

⁵⁸ EYAL PELEG, PRIVATIZATION AS PUBLICIZATION: PRIVATE BODIES IN PUBLIC LAW 48 (2005) (Hebrew).

the powerful. They are the ones...to make use of the new Constitutional discourse in order to broaden the range of possibilities at their disposal.”⁵⁹

Ben-Israel defines the HCJ’s Constitutional interpretation as a “neo-liberal, individualistic approach...which supports the market economy and rejects any state involvement.”⁶⁰ Mautner notes that “during the 1990s the HCJ did not address the social distresses to which wide layers of the population had been subject. The Basic Laws provide Constitutional protections for the interests of those controlling the market’s wealth and power...it appears that a large portion of the court’s activity...was dedicated to the protection of economic interests.”⁶¹ Finally, Marmor argues that the HCJ’s decisions reflect a libertarian approach.⁶²

How has this shift in Israel’s law and political economy affected the social and economic well-being of its citizens? The data indicate that a significant change has indeed occurred “on the ground.” In the past, Israel was one of the western-industrialized countries with the lowest rates of poverty and the highest rates of income equality. For example, during the 1950s the two upper tenths of the society gained income which was only 3.3 times more than the income gained by the two lowest tenths.⁶³ This relation was generally maintained until the 1970s, but began to change with the emergence of neo-liberal trends in the 1980s.⁶⁴

During the past 20 years, a dramatic increase in rates of income inequality has taken place: by 1995, the two upper tenths of the Israeli society have earned 21.3 times more than the two lowest tenths, turning Israel to be the leading country in income inequality among western-industrialized countries.⁶⁵ The National Insurance Bureau reported that in the early 2000s 20% of the families receiving income maintenance allowances did not have any housing and had to

⁵⁹ Guy Mundlak, *Social and Economic Rights in the New Constitutional Discourse: From ‘Social Rights’ to the ‘Social Dimension of All Rights,’* 7 LABOR LAW YEARBOOK 65 (1999) (Hebrew).

⁶⁰ Ruth Ben-Israel, *The Constitutional Revolution and its Labor Law Ramifications,* 4 LABOR LAW YEARBOOK 27 (1994) (Hebrew).

⁶¹ Menachem Mautner, *Invisible Law,* 16 ALPAYIM 45 (1998) (Hebrew).

⁶² Andre Marmor, *Judicial Review in Israel,* 4 HAIFA UNIV. L. REV. (1997) (Hebrew).

⁶³ Bichler and Nitzan, *supra* note 34, at 475-476.

⁶⁴ Ram, *supra* note 37.

⁶⁵ Bichler and Nitzan, *supra* note 34, at 475-476. For further data on income inequality and social gaps in Israel *see* reports by “Adva”, *supra* note 28 (<http://www.adva.org/>).

live in the street or in public shelters; 24% of those families suffered a shortage of food, and 40% of the people receiving the allowance were not able to purchase medicine.⁶⁶

More updated data published by the National Security Bureau and the Central Bureau for Statistics reveal that the welfare reform of 2001-2004 caused over 200,000 Israelis to fall beneath the poverty line.⁶⁷ For example, during 2003, 22% of the households were considered poor – a 50% increase from the rate in 1990. 29% of the Israeli children were beneath the poverty line in 2003, an almost 30% increase since 1990.⁶⁸

In 2004, Israel became the second country in the western-industrialized world after the U.S.A. in its poverty rates: one of every five families, one of every four citizens and one of every three children were living beneath the poverty line, and the income of the lowest tenth of Israeli society suffered a 9% decrease, leaving poor families with an average income of 33% below the poverty line.⁶⁹ By mid-2005, the number of Israelis living in poverty increased to 1.58 million, 24.1% of the population—738,000 of whom are children. It should be noted that 41% of the poor families are headed by an individual who is employed.⁷⁰

Hence, we can see that the dramatic shift in the Israeli law and the political economy has caused an overwhelming shift in rates of income inequality. We will now examine the reflection of this shift in the context of the Israeli labor market.

⁶⁶ Y. KING AND G. MAOR SHAVIT, THE QUALITY OF LIFE OF INCOME MAINTENANCE ALLOWANCE RECEIVERS (The National Insurance Bureau, 2005) (Hebrew).

⁶⁷ Ruti Sinai, *Shalom Forgot He was the One who Initiated the Cut*, HAARETZ, November 23, 2005 (Hebrew).

⁶⁸ Moti Basuk, *The Number of Poor in Israel Increased by 50% in the Years 1990-2003*, HAARETZ, December 8, 2005 (Hebrew).

⁶⁹ Ruti Sinai, *The Rate of Poverty in Israel is Among the Highest in the Industrialized Countries*, HAARETZ, October 18, 2005 (Hebrew).

⁷⁰ Ruti Sinai, *Increase in Poverty: A Quarter of the Israelis*, HAARETZ, January 23, 2006 (Hebrew).

2. Corporate Activity and its Effects on Workers

Since the mid-1980s, following widespread privatization, corporate activity has increased dramatically in Israel. Corporations' share of the economic growth and their participation in public decision-making processes have made them increasingly powerful actors in the Israeli society. Simultaneously, the share of labor in corporate profits has decreased dramatically, turning more and more workers into extremely low-wage laborers. Data published in 2005 and 2006 by the Business Data Israel (BDI), a leading group for information on corporate activity in Israel,⁷¹ reveal that 500 corporations currently control the lion's share of the economic activity in the country. More specifically, these companies hold NIS 620 billion (about \$132 billion), representing over 60% of the business sector's income.

Furthermore, 32% of these corporations are controlled by only 18 groups of shareholders. The annual income of these shareholders is NIS 198 billion (\$42.12 billion), representing 77% of the annual government budget.⁷² Among these corporations, 57% are private companies, 40% are public (i.e., registered on the stock market) and only 3% are owned by the government.⁷³

The rise in corporate activity has gradually increased as Israel has embraced neo-liberalism over the past 20 years. For example, between 1986 and 2000, 83 governmental companies were privatized for a total amount of nearly \$9 billion⁷⁴. During the 1990s, the rate of corporations registered on the Israeli stock exchange increased six times more than the average world increase, being second only to Germany, which went through similar stages after its unification.⁷⁵

⁷¹ This group is the Israeli branch of the International Coface Group which provides business information and credit evaluation for businesses worldwide. See <http://www.coface.com/>.

⁷² Ora Koren, *18 Families Control 32% of the Income in the Economy*, HAARETZ, February 14, 2006 (Hebrew).

⁷³ Ran Rimon, *Only 16 Families Hold More Than 20% of the Income of the Market's 500 Leading Corporations*, HAARETZ, August 21, 2005 (Hebrew).

⁷⁴ Ram, *supra* note 37, at 37.

⁷⁵ Bichler and Nitzan, *supra* note 34, at 428.

How has this situation affected labor? Workers are corporations' most identified actors, most responsible for their daily conduct,⁷⁶ and vice versa: the social and economic welfare of workers, their pursuit of personal fulfillment in the workplace—all make them the group most dependant on corporations.⁷⁷ According to the Israeli Central Bureau of Statistics, in late 2005 the number of employees in the Israeli economy was 2.47 million.⁷⁸ The 500 corporations mentioned in the BDI data employ about 40% of employees in the Israeli business sector;⁷⁹ over 150,000 workers are employed only by the 18 groups controlling this sector.⁸⁰ More generally, the Bank of Israel reported that between 1985 and 1993 the percentage of workers in the private sector increased from 67% of the workforce to 76%.⁸¹

However, these workers' share of the income has decreased dramatically as corporate income has increased. Currently, about 50% of Israeli workers are reported to be living beneath the poverty line (this line stands at about \$385 of individual income per month, which is 50% of the net median income).⁸² Official data published by the Central Bureau of Statistics show that 26% of Israeli employees earn an average monthly wage of NIS 1,945 (about \$414), which is less than one-third of the average monthly wage in the country (estimated to be about NIS 7,180 or \$1528).⁸³

Data published by the "Adva" Center, the leading non-governmental research institute on social and economic issues, reveal that during the early 2000s about 72% of Israelis earned the average monthly wage or less; 60% earned

⁷⁶ LAWRENCE E. MITCHELL, *CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT* 208 (2001).

⁷⁷ Clyde W. Summers, *Codetermination in the United States: A Projection of Problems and Potentials*, 4 J. COMP. CORP L. & SEC. REG. 155, 170 (1982).

⁷⁸ Moti Basuk and Lilach Weisman, *The Wages of 26% of Employees is Less than NIS 3,600*, HAARETZ, February 6, 2006 (Hebrew).

⁷⁹ Rimon, *supra* note 73.

⁸⁰ Koren, *supra* note 72.

⁸¹ Ram, *supra* note 37, at 37.

⁸² This is taken from public statements made by Professor Zvi Zusman, the former Vice President of the Bank of Israel, based on his work. See Moti Basuk, *Former Senior in the Bank of Israel: Netanyahu was Wrong, The Majority of the Poor are Working*, HAARETZ, December 25, 2005 (Hebrew).

⁸³ Chaim Bior, *The Histadrut's Plan to Reduce Poverty: Grants for Factories will be Conditioned on Compliance with Labor Laws*, HAARETZ, February 8, 2006.

less than three quarters of the average monthly wage, and about 32% received less the minimum wage, which is currently NIS 17.93 (\$3.81) per hour.⁸⁴

Furthermore, with the beginning of the Oslo process between Israel and the Palestinians in the mid-1990s, new labor markets were opened to Israeli corporations. Jordan and Egypt became destinations for plant relocation, allowing employers to lower labor costs by closing their factories in the Israel and reopening them across the border – where labor laws provide workers with very few protections. This was also true of the Joint Free Trade Zones, which were established in the West Bank and Gaza as part of the agreements between Israel and the PLO. Thus, the regionalization of the Middle-Eastern economy had two immediate effects on the labor market: first, unprecedented trend of plant closing accompanied by mass layoffs, especially in the textile industry, and to a lesser extent in light industry and food. Second, some of the leading Israeli corporations relocated their plants and started employing Egyptian, Jordanian and Palestinian workers for considerably lower wages.⁸⁵

During those years, Israel also became one of the western economies to have the highest rate of outsourcing. The exact numbers are not obvious: according to the Ministry of Employment, 4.3% of Israeli employees were employed through manpower companies during 2002, in comparison to less than 1% in the United States, Britain, Spain, Germany, Austria and Italy.⁸⁶ However, unofficial data indicate that during the 2000s the number of workers that were employed by manpower and other subcontracting companies (for example, companies providing cleaning, nursing and security services) reached about 10%.⁸⁷ According to calculations made by Professor Ruth Ben-Israel of Tel Aviv

⁸⁴ SHLOMO SWIRSKY AND ETI KONOR-ATTIAS, ISRAEL: A SOCIAL REPORT (Adva, 2004).

⁸⁵ Guy Mundlak, *The Limits of Labour Law in a Fungible Community*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES* 279-298 (Joanne Conaghan, Richard Michael Fischl, Karl Klare eds., 2002).

⁸⁶ RONIT NADIV, *EMPLOYMENT THROUGH MANPOWER SUBCONTRACTORS: ISRAEL, 2000* (The Ministry of Employment, 2003) (Hebrew).

⁸⁷ NOAM ABHASERA, NETA BEKER AND ZIV COHEN, *INVISIBLE WORKERS IN THE PUBLIC SECTOR 5* (The Employment and Welfare Clinic, Hebrew University Faculty of Law, 2006).

Faculty of Law, the real numbers actually show that manpower companies employed approximately 25% of the labor force in Israel as early as 1997.⁸⁸

Confusing as they may be, these numbers clearly demonstrate that outsourcing has indeed become an extremely popular trend in the Israeli labor market. Moreover, the Ministry of Industry, Trade and Employment reported in 2005, that 25% of manpower employees earned approximately the minimum wage.⁸⁹ At the same time, Manpower Co.—the leading corporation to employ manpower workers in Israel—appeared in the “Fortune 500” list as one of the most profitable corporations in the world.⁹⁰

What conclusions can we draw from these data? Evidently, the main conclusions are that (1) corporations have become extremely powerful and influential in the Israeli economy; (2) their share of the economic growth has been growing dramatically in recent years; and (3) corporate workers, being the largest population in the Israeli workforce, not only have not enjoyed this increased income but, in fact, their share has decreased, turning many of them into the “working poor.” It appears that Israeli labor has become a commodity. Yet, these numbers show that labor market injustices should not be attributed to a specific pattern of employment (e.g., employment via manpower agencies or outsourcing). Rather, these injustices point to a basic distortion in the system that decides how income is shared between capital and labor; in other words, something in the way corporate income is distributed between shareholders on the one hand and employees, on the other, is wrong.

Therefore, the first step required in correcting this distortion is to look not only at the *extreme expressions* of the problem, but at the *fundamental structure of corporate income distribution*. Arguably, even if minimum rights are provided, income inequality will still increase, causing a long series of social ills. Hence,

⁸⁸ Ruth Ben-Israel, *Outsourcing: A New Interpretation—Replacing the Formal Transaction by an Authentic One*, 7 LABOR LAW YEARBOOK 5, 11-12 (1999) (Hebrew).

⁸⁹ RONIT NADIV, LICENSED MANPOWER SUBCONTRACTORS (The Ministry of Trade, Industry and Employment, 2005) (Hebrew).

⁹⁰ <http://money.cnn.com/magazines/fortune/global500/companies/M.html> (last visited March 2006).

those who pursue the well-being of workers in the long term must address first and foremost the structure that allows income inequality to continue growing.

B. STRATEGIES ADOPTED BY PUBLIC-INTEREST LEGAL ORGANIZATIONS

How have public-interest legal organizations reacted to the harsh reality faced by corporate workers in Israel? What legal strategies have they adopted to cope with it? To answer these questions, we will look at three prominent public-interest groups – the ACRI, the “Worker’s Hotline,” and the Forum for the Enforcement of Workers’ Rights (“the Forum”). These groups are the predominant organizations dealing with workers’ issues, lobbying and litigating the lion’s share of public-interest cases concerning those issues. The cases we will examine are those which addressed fundamental issues of corporate-labor policy. Therefore, these cases are considered to be the “flagships” of public-interest engagement in workers’ advocacy.

First, we will provide a brief overview of the Israeli labor law system. Under this system, cases involving matters of labor and employment disputes, social security benefits, and health insurance eligibility—all of which are heard by a special labor court system. A Regional Labor Court presides as the first instance (operating in several geographic regions) and the National Labor Court presides as the instance of appeal over the Regional Court and as the first instance for certain disputes which involve trade unions.

Almost all of the decisions of the Regional Labor Courts can be appealed. However, most cases are settled and do not even reach the verdict stage in the first instance. There is no official instance of appeal over the decisions rendered by the National Labor Court. Nevertheless, the parties may petition the HCJ against these decisions, which then serves as a de facto instance of appeal (although very rarely does the HCJ overturn the National Labor Court).

1. The Association for Civil Rights in Israel (ACRI)

As we have seen in Chapter I, the ACRI is the largest most prominent public-interest organization for human rights in Israel. For many years, its engagement with workers' issues concerned primarily *human rights in the workplace*. This included matters of employment discrimination; migrant workers' rights; and civil and political rights (e.g., the right to privacy, due process, and freedom of speech). However, it did not include matters concerning labor wages and conditions. As will be described later, the ACRI started to address such issues only in 2005.

Three main cases reflect the ACRI's emphasis on employment discrimination. In the famous case of *Danilovich v. El Al*,⁹¹ the ACRI represented a steward who worked in what was then the National Airline Company. The company denied the steward a free ticket for his spouse—a benefit regularly provided for the company's employees—only because his spouse was a man, not a woman. The ACRI first represented Danilovich, the steward, in the Regional and National Labor Courts, and later, in the HCJ, to which “El Al” petitioned against the decision, which accepted the claim. The arguments made by the ACRI referred primarily to employment anti-discrimination rules and to the general concept of equality. Subsequently, in a historic ruling, the HCJ denied “El Al's” petition, emphasizing the right to equality in the workplace. However, its decision has been considered to be a landmark in the legal struggle for gay rights in Israel, but not in the struggle for workers' rights. In fact, the lawyers who litigated the case on behalf of the ACRI were leading constitutional attorneys, with no particular training in or orientation toward labor and employment issues.

Similarly, in the case of *Nidam v. Rali Electricity and Electronics*,⁹² the ACRI represented a saleswoman who was paid lower wages than her male colleagues during her 4-year employment at the company. The case was litigated

⁹¹ H.C.J. 721/1994 *El A v. Danilovitch*, P.D. 48(5) 749.

⁹² District Labor Court – Beer Sheva 1576/1999 *Simi Nidam - Rali Electricity and Electronics* (unpublished, November 5, 2003).

in the Regional Labor Court. The legal argument concerned the Equality of Opportunity in Work Law (1988), and the Equal Pay for Male and Female Workers Law (1996). Litigating the case, the ACRI presented an extremely complex calculation, which exposed the discriminatory practices the company has employed against women. Yet, winning the case was again considered to be an important achievement for the human rights movement—in this case, women’s rights—not necessarily workers’ rights.

The third case reflecting the focus on employment discrimination was *S.B. v. Margoa Arad Hotel*.⁹³ In this case, the ACRI represented a pastry cook who was fired due to a demand by the Rabbinate (the orthodox Jewish institute) because she had worn a shirt which did not cover her arms. This case, which was settled for a relatively small amount of compensation, also relied on antidiscrimination laws, as well as on laws regulating breach of employment contracts. The context in which it was litigated concerned, once again, equal rights for women in the workplace, as well as the freedom of religion. Workers’ rights *as such* were rarely on the agenda.

Also demonstrating this policy were cases concerning migrant workers’ rights. In this field the ACRI litigated and lobbied primarily vis-à-vis the state to change statutory legal arrangements and government policy. With other groups, the organization petitioned the HCJ to declare the “Binding System” unconstitutional. This system forbids the employee from resigning from her job, despite any abuse she suffers at the hands of the employer. In March 2006, the HCJ accepted the petitions and rendered an overwhelming decision about the importance of migrant workers’ rights.⁹⁴

The ACRI also led the petition to declare the 2001 amendment to the Entrance to Israel Law (1952) unconstitutional. This amendment created a legal procedure that allowed the state to detain and deport migrant workers without due

⁹³ District Labor Court – Beer Sheva 1583/1999 *S.B. - Margoa Arad Hotel* (unpublished, October 28, 2003).

⁹⁴ H.C.J. 4542/2002 “*Worker’s Hotline*” *et al v. the Government of Israel* (unpublished, March 30, 2006).

process. Following several years of litigating the case, the HCJ finally rejected the petition.⁹⁵

Another case was that of *A.G.A. Company for Services et al. v. the Minister of Interior*,⁹⁶ in which the ACRI petitioned the HCJ to join a case as an “Amicus Curiae” (“Friend of the Court”). This institution is an old legal procedure, in which the court allows a third party to express its opinion on the issues at stake, given its special expertise or interest in the case. Joining cases as “Amicus Curiae” has, in fact, become a common strategy for litigation among public-interest groups in recent years.⁹⁷ In this case, the ACRI actually supported the position of corporations, arguing that the state should not require them to place a deposit to guarantee that their foreign workers leave the country at the end of the employment contract. Such a requirement, the ACRI argued, encouraged the corporations to supervise their employees’ movement and to control them as much as they can, allowing human rights violations to occur. The HCJ eventually advised the parties to settle their dispute by litigating individual cases in lower courts. As a result, the petition was withdrawn.

In 2004, the ACRI lobbied the Knesset against a proposed bill regarding migrant workers’ rights. This bill proposed an amendment to the National Employment Service Law (1959), allowing manpower companies to collect \$1,000 in commission from migrant workers as a condition of their recruitment to work in Israel. The ACRI expressed its objection to the amendment in letters and meetings with members of the Knesset. It argued that legally allowing manpower companies to collect commission fees to increase their profits imposes *debt bondage* on migrant workers. Thus, migrant workers would be forced to take out loans and to mortgage whatever property they might have in order to pay the fee,

⁹⁵ H.C.J. 6535/2002 “*Hotline for Migrant Workers*” v. *the Minister of Interior* (unpublished, June 15, 2005).

⁹⁶ H.C.J. 155/1997 *A.G.A. Company for Services et al. v. the Minister of Interior* (unpublished, February 12, 2001).

⁹⁷ Michal Aharoni, *The American Friend: About the ‘Amicus Curiae,’* 18 HAMISHPAT 30 (2004) (Hebrew).

and then to work in exploitative conditions to repay these loans and mortgages.⁹⁸ This lobbying failed and the amendment to the law was eventually passed.

The third and final type of cases reflecting the engagement of ACRI with human rights in the workplace addressed “*classic*” *civil and political rights*, namely, the right to privacy, information, due process, and freedom of speech.

For example, in the case of *X v. Adam Institute*,⁹⁹ which is still pending in the Tel Aviv District Court, the ACRI represented a salesperson who had been unemployed for several months. After applying for a job, the plaintiff was required to pass an occupational assessment test conducted by a private company, the “Adam Institute.” Not only did the plaintiff not pass the test, but the company which conducted it refused to give him the results or the reasons for his failure. Therefore, after being denied of remedy by the Magistrates Court, the salesperson filed an appeal in the District Court. He asked that the court order the “Adam Institute” to provide him with his allegedly failing test scores. The arguments made in the case referred to the constitutional right to privacy, to autonomy, to dignity, to occupation, and to information. ACRI’s attorney also argued that the “Adam Institute” should be liable for not acting with reasonable care toward its examinees, including not providing the information collected about them.

However, the ACRI went on to argue a twofold and rather complex argument, directly addressing issues of labor-management relations. First, it argued that the transparency laws regarding information disclosure should apply not only to the state, but also to private parties—such as corporations—which possess the strength to adversely affect human rights. Second, the ACRI argued that the inherent gap between the bargaining power of the employer, on the one hand, and that of the employee, on the other, has not changed. It has merely been transformed into new patterns and methods of employment, including the involvement of “test evaluation companies.” Therefore, companies such as the “Adam Institute” should be held accountable for performing the duties once performed by the “classic” employer in the workplace. That is, they should be

⁹⁸ Letter from the ACRI to the Minister of Industry, Trade and Employment (July 29, 2004) (Hebrew).

⁹⁹ C.A. (2003) *X v. Adam Institute* (appeal filed on May 14, 2003).

prohibited from forcing an employee to sign a contract which unlawfully denies her the right to receive personal information. Such a contract should be held invalid as is any other employment contract which imposes unfair practices upon the employee.¹⁰⁰

In the case of “Eged,” the ACRI sent a letter to the biggest bus company in Israel following a newspaper article. The article described how people from the firm’s internal investigations department “arrested” a company driver in front of his passengers. According to the article, these people also searched the driver, detained, and investigated him under a great deal of pressure. The company’s spokesman told the newspaper that “each employee who joins ‘Eged’ signs a contract, acknowledging that she is now working for a company, which is like a state within the state of Israel, and has its own regulations.”

The ACRI’s letter focused on the perception of the state as the only institution which is allowed to use means of violence and coercion for social purposes. Based on this perception, “Eged’s” policy violated the basic right to freedom, dignity and privacy, as well as criminal provisions, and established civil liability for injuries under tort law.¹⁰¹ The letter also addressed the scope of the Managerial Prerogative given to the employer—the right to run his business as he sees fit:

[I]ndeed, the employer has a legitimate interest to run her business and to promote it, which includes the prevention of criminal or disciplinary offences committed by her employees. Nevertheless, this interest cannot grant the employer authorities which are preserved only for the state to execute. An employer is not authorized to harm his employees’ basic rights by virtue of their sweeping ‘consent’, which the employer received upon their admission to the job. The cautious and skeptical approach of labor law toward workers’ ‘consent’ to waive their rights applies all the more forcefully when fundamental rights are concerned; moreover, the approach defining human rights as inalienable must be

¹⁰⁰ In January 2005, the Attorney General filed a request to the court to join the appellant in the case in support of ACRI’s position. See Ruti Sinay, *The Attorney General: Assessment Tests Companies Should Provide Examinees with the Scores of Their Tests*, HAARETZ, January 2005 (Hebrew).

¹⁰¹ Letter from the ACRI to Arik Feldman, the Chairman of the Secretariat of “Eged” (Dec. 15, 2005) (on file with author).

maintained especially in view of the unequal power relations between the employer and the employee.¹⁰²

In the case of *Bachar v. “Yediot Achronot”*,¹⁰³ which is still pending, the ACRI filed an “Amicus Curiae” to the Regional Labor Court. The case addressed an unlawful discharge claim brought by the former editor of a popular weekly magazine of a major media corporation. The editor, Bachar, was discharged because he insisted on covering political corruption cases during the 2006 elections in Israel. The ACRI joined the case in to point to the threat perceived to reporters’ freedom of the press and of speech. “Is the private press like any other enterprise in the private sector,” the group’s attorney wrote, “which is not accountable but to its shareholders, or is it...an enterprise carrying out public functions, hence holding fiduciary duties to the public?”¹⁰⁴

We arrive now at what seems to be a new era in the ACRI’s engagement with corporate workers’ issues. In 2004, the organization decided to expand its activity on social and economic rights. The goal was then defined as “changing the public discourse” on those issues.¹⁰⁵ After a relatively long series of meetings, consultations and “brain storming” sessions, workers’ rights were selected as the central topic to be addressed as part of this expansion. The assumption was that labor becoming a commodity is the most dangerous phenomenon in the social-economic reality in Israel.

Thereafter, the ACRI has litigated several cases involving matters of wages and benefits—all relating to contract workers.¹⁰⁶ Indeed, the ACRI’s lawyers who deal with workers’ issues have identified the growing employment

¹⁰² *Id.*

¹⁰³ District Labor Court – Tel Aviv – 2558/2006 *Bachar* - “*Yediot Achronot* (request filed February 20, 2006).

¹⁰⁴ Apart from the issue at stake, this question itself was an interesting observation; in a nutshell, it expressed the ACRI’s position about the traditional duties of the corporation—to serve its shareholders—which according to the group should not necessarily be challenged; instead, the ACRI argued that specific corporations (i.e., newspapers) should be considered as public enterprises subject to a different set of rules altogether. In other words, presenting this question the way it did, ACRI accepted the *Shareholder Primacy Model*, but argued that specific companies as unique forms of corporations.

¹⁰⁵ This purpose was defined and drafted by a special team within the ACRI, which was assigned to decide new policies on social rights. This team, which the author was part of during his internship in the ACRI’s legal department, conducted several meetings during 2004.

¹⁰⁶ These cases were filed in the Labor Court during 2005 and 2006 and they are all still pendant.

of workers through outsourcing contractors (whether manpower companies or subcontractors who provide various services) as the key problem in the Israeli labor market today. Some of them have argued that the goal of advocacy in the field should be to establish the liability of *de facto* employers in violating contract workers' rights.¹⁰⁷ This approach can be found in the cases the ACRI chose to take, as well as the arguments it made.

In the case of *K.Y. v The State of Israel and El Al*,¹⁰⁸ the ACRI represented a former security worker in "El Al," the biggest Israeli airline. After passing a training course, the plaintiff arrived at Amsterdam's airport to be stationed there as an Assistant Security Officer. He was required to sign an employment contract, which not only included working conditions worse than those initially promised to him, but also specified that resigning within less than two years of employment would result in a \$2,500 fine to cover "training expenses." The plaintiff, who by that time had made all the arrangements to come to Amsterdam with his wife, had to sign the contract and started working. However, about a year later, the plaintiff had to resign from his position and return to Israel due to his wife's health problems. In his last paycheck, he discovered that about \$1,280 had been deducted as a fine. Bringing action against "El Al," the ACRI explained that illegal fine deductions are a common pattern of abuse, and workers—particularly in the subcontracting industry—were often forced to sign employment contracts "allowing" such deductions.

The legal argument made by the ACRI in the case, therefore, primarily addressed contractual provisions in the context of employer-employee relations. It argued that the employment contract issued by "El Al" was a practice of unfair bargaining under the Standard Contracts Law (1982), reflecting the considerable gap between the bargaining power of the employer and that of the employee. Moreover, the gap between what had been described to the worker prior to his arrival at Amsterdam and the content of the actual employment contract he was

¹⁰⁷ Interview with A, Attorney, the ACRI, in Tel Aviv, Israel (Jan. 10, 2006).

¹⁰⁸ District Labor Court – Jerusalem – 2002/2005 *K.Y. - The State of Israel and El Al* (claim filed June 30, 2005).

required to sign, pointed to a lack of good faith on the part of “El Al,” a condition required by Section 12 of the Contracts Law (General Part) (1973).

The argument continued to show that according to the Salaries Protection Law (1958), the employer was not allowed to impose fines on the employee and to deduct them unilaterally. Imposing such fines meant binding the worker to the employer, similar to the problematic system applied to migrant workers. “[It] seeks to protect an illegitimate interest of the employer to prevent the mobility of workers,” the ACRI’s lawyer wrote in the case. “Limitations on the freedom of occupation are legitimate only if they come to protect a legitimate interest of the employer, and if it is done in a proportional manner.”¹⁰⁹

In *A.P. et al v. S.A.S.*,¹¹⁰ the ACRI represented a group of plaintiffs, all of whom were employed by a subcontracting security company to work for “Shupersal,” a large and profitable Israeli corporation, as guards in supermarkets. Their claim included a long list of rights and benefits of which they were deprived: overtime payment, annual leave, breaks, various wage deductions, holiday compensation, convalescence pay, pension fund, traveling costs reimbursement, and dismissal pay. The claim described how hiring subcontracting companies allows *de facto* employers to avoid having employee-employer relations with their workers.

Furthermore, as *de facto* employers choose to hire subcontractors who offer the lowest bid, those subcontractors seek to profit from the deal, and workers become the weakest link in the chain of business. The violation of their rights becomes only a matter of time. Based on the labor laws which define “who the employer is,” the ACRI argued that “Shupersal”—as the *de facto* employer—is liable for the alleged violations of workers’ rights.¹¹¹ Moreover, it argued that

¹⁰⁹ *Id.*

¹¹⁰ District Labor Court – Tel Aviv – 9664/2005 *A.P. et al - S.A.S.* (claim filed on November 17, 2005).

¹¹¹ These laws have adopted a substantive test for determining the identity of the *de facto* employer based on the circumstances of each case and on the answers given to a series of questions, such as who supervised the employee; who decided about the employee’s working time, breaks and leaves; who paid her salary; and who provided her with working tools and equipment. The purpose of this test has been to recognize new and complex methods of employment in the labor market while simultaneously preventing workers’ exploitation. Based on this legal

the defendants should pay punitive damages as a unique means of deterring employers from engaging in systematic patterns of violating labor laws. The employer's motivation to violate workers' rights, the ACRI concluded in its argument, is to increase profits.¹¹²

In *Gemamer v. Saar Security and Services*,¹¹³ the ACRI represented a security worker who worked for a subcontracting company hired by the Office of the State Comptroller. The plaintiff, as in the *S.A.S. Case*, did not receive "all the rights to which he is entitled according to the protective labor laws, aimed at ensuring a basic safety net..."¹¹⁴ Once again, the ACRI emphasized the fact that "the circumstances detailed in this case are not unique. They describe a common pattern of employment through manpower or services subcontracting and the *de facto* employer's renunciation of any responsibility toward workers' rights...this pattern harms the rights of workers in Israel and this is the reason why the ACRI chose to represent the plaintiff in this matter."¹¹⁵

Arguing for the liability of the Office of the State Comptroller, the ACRI focused on the model of *Joint Employer Status*. This model identifies both the subcontractor and the *de facto* employer as being liable for the plaintiff's working conditions. Alternatively, the ACRI argued that the *de facto* employer should be held accountable by virtue of its residual liability and its duty to act in good faith. Claiming punitive damages, the ACRI once again pointed to "[t]he pattern in which workers' rights are routinely violated."¹¹⁶

Finally, there was the case of "*Polgat*." This case did not involve litigation or lobbying, and—in fact—was a "one-time experiment." However, the case should serve as an illustration of the potential directions for the cause lawyering movement. In late 2004 two young investors purchased "*Polgat*," a well known Israeli company for manufacturing clothing. Shortly after taking over

framework, the ACRI has argued that "Shupersal" should be held accountable for violating the workers' basic rights protected by various protective labor laws.

¹¹² A.P. et al - S.A.S., *supra* note 110.

¹¹³ District Labor Court – Jerusalem – 1270/2006 *Gemamer - Saar Security and Services* (claim filed on February 13, 2006).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

the company, these new investors declared a \$34 million dividend – about two thirds of the company’s equity capital.

At that time, the company had employed several hundred workers in its factories in Kiryat Gat – a poor city in the south of Israel. Most of these workers earned minimum wages (approximately \$3.98 per hour). Not surprisingly, the workers feared that such a substantial dividend to shareholders would harm the company’s financial stability and jeopardize their job security in the long-term. For them, the job at “Polgat” was (and still is) their only source of a livelihood.¹¹⁷ After reading about the case in the newspaper, the ACRI sent a letter to the new owners of the company, calling upon them to consider the effect such a dividend might have on their workers’ long-term welfare. The letter argued that a company should reasonably balance its purpose of maximizing shareholder value and taking the interests of its workers into account.¹¹⁸ This central argument was based on the first part of Section 11(a) of the Israeli Companies Law (1999), specifying that “the purpose of a company shall be to operate in accordance with business considerations in realizing its profits, and within the scope of such considerations, the interests of its creditors, its employees and the public; may inter alia be taken into account.”¹¹⁹

The letter was never answered. However, after the sending of the letter, an internal debate emerged within the ACRI. Profound conversations were held; detailed emails were exchanged. Lawyers as well as members of the board expressed their views. Some were furious that the organization had made such a statement regarding what they saw as matters of business judgment that did not directly threaten workers’ rights: “reduction of share capital,” wrote a member of the ACRI’s board, “does not in itself harm the right of any individual. It might

¹¹⁷ The facts regarding the “Polgat” case are taken from newspaper articles published between January and April 2005 in the Israeli financial magazine “TheMarker” (<http://www.themarker.com>) and from a conversation with the head of the “Histadrut” in Kiryat Gat (January 2005).

¹¹⁸ For the letter in Hebrew *see* <http://www.acri.org.il/hebrew-acri/engine/story.asp?id=1044> (last visited March 2006).

¹¹⁹ The second part of this section continues to determine that “similarly, the company may donate a reasonable sum for a proper object, even if such donation is not within the scope of business considerations as aforesaid, if a provision for such is laid down in the articles of association.”

cause harm only if it threatens the financial stability of the firm. . .but if there is no such risk, then we have no problem and no one needs to intervene.”¹²⁰

The board member suggested the following analogy: “Let us assume that ‘Polgat’ decides to start manufacturing pink silk underwear for men. This decision might cause the company to face bankruptcy and damage its workers’ rights. However, the ACRI would hardly interfere with such a clear issue of business judgment.”¹²¹ Another attorney argued that building on Section 11(a) made a very weak legal argument because this Section does not *require* corporations to take the interests of their workers into account but merely *allows* them to do so.¹²²

Those who supported the letter argued that it was no less than the duty of the ACRI to identify new and unfamiliar trends of threats to workers’ rights. “There is a genuine problem here,” wrote one of the group’s attorneys, “we cannot talk about the theory of workers’ rights while at the same time ignoring the reality. Therefore, it is not for us to shape the business policy of corporations, but protecting workers’ rights should be part of their guiding principles.”¹²³ This lawyer also emphasized that the reduction of share capital is not like any other business decision because it has a particularly broad effect on third parties, including creditors and workers.¹²⁴

Another lawyer wrote: “Our letter did not demand that ‘Polgat’ avoid reducing its capital. It merely argued that as part of considering the step, the company should take the effects it has on workers’ rights into account.”¹²⁵ This, some lawyers suggested, can also be learned from the legal requirement that firms

¹²⁰ Email from A.H., Board Member, the ACRI, to Lawyers in the Group (Feb. 8, 2005) (on file with author).

¹²¹ *Id.*

¹²² Email from D.Y., Attorney, the ACRI, to Lawyers in the Group (Feb. 7, 2005) (on file with author).

¹²³ Email from S.A.W., Attorney, the ACRI, to Lawyers in the Group (Feb., 7, 2005) (on file with author).

¹²⁴ Email from S.A.W., Attorney, the ACRI, to Lawyers in the Group (Feb. 9, 2005) (on file with author).

¹²⁵ Email from D.A., Attorney, the ACRI, to Lawyers in the Group (Feb.7, 2005) (on file with author).

must receive the court's approval before paying dividends if their financial situation is uncertain.¹²⁶

Indeed, the “*Polgat*” case was a unique attempt by the ACRI to explicitly address corporate governance issues which affect income distribution. This had not been done before nor has it been done since. The intense controversy it aroused within the organization—and especially among the leading staff of the legal department—meant that no similar cases would be pursued, at least not in the foreseeable future. However, some lawyers in the ACRI today consider this case to be an “interesting experiment,” which may signal the way for new approaches at a later stage.¹²⁷

2. “Worker’s Hotline”

We will now explore the strategies adopted by the first major public-interest organization in Israel to concentrate on workers’ rights. This organization has since become a central actor in the legal battle for workers’ protection in the country. In recent years, it has also become the first Israeli group to engage in the campaign for “*Corporate Social Responsibility*” (CSR). Therefore, its strategies are a fascinating case study to examine.

As mentioned in Chapter I, the “Worker’s Hotline” was established in 1991 to assist Palestinian workers who were employed in Israel (primarily in the construction and services industries) and in Israeli settlements in the Occupied Territories. During the early 1990s, the organization represented Palestinian workers in individual lawsuits filed in labor courts.¹²⁸ It also litigated Supreme Court cases which challenged government policy on Palestinian labor in Israel.¹²⁹

In the mid-1990s, after Israel placed a permanent border closure on the Occupied Territories, Palestinians were prevented from entering the country to

¹²⁶ Email from S.A.W., Attorney, the ACRI, to Lawyers in the Group, *supra* note 124. This requirement in Section 303 of the Companies Law will be addressed in Chapter IV.

¹²⁷ Interview with A, Attorney, the ACRI, *supra* note 107.

¹²⁸ See the organization’s website, *supra* note 24.

¹²⁹ Guy Mundlak, *Power-Breaking or Power-Entrenching Law? The Regulation of Palestinian Workers in Israel*, *supra* note 44, at 602.

work. Although the “Worker’s Hotline” maintained its activity among Palestinian workers, the sharp decrease in their participation in the workforce caused it to address new populations. The organization started representing other low-paid, low-skilled populations. These were primarily international migrant workers, who replaced Palestinians in the construction and services industries and also worked in agriculture and nursing. The organization also opened access to Israeli contract workers and soon became their leading advocate.¹³⁰ Thereafter, the “Worker’s Hotline” has represented workers both at the individual level as well as engaging in advocacy for changes in public policy.

At the individual level, the “Worker’s Hotline” has provided paralegal and legal aid. They have documented workers’ complaints, negotiated with employers (this has usually been done through a telephone call or an exchange of letters), prepared lawsuits and provided court representation. The issues have included wages, benefits and employee compensation, as well as social security claims (e.g., maternity suits). In 2004, for example, the organization assisted up to 3,000 employees—many of whom were corporate workers—in winning a total of over \$800,000.¹³¹

Litigation has brought the “Worker’s Hotline” face-to-face with some of Israel’s largest corporations. In the case of *Xue Bin et al v. A. Dori*,¹³² for example, the organization represented seven migrant workers from China, who worked for the “A. Dori” construction company. The case revealed a unique method of employment, in which “A. Dori” transferred the workers’ salaries to a Chinese manpower company, which had initially recruited the workers. However, this company paid the workers only a small monthly allowance of 50-100 NIS (\$11-\$21).

Ruling in favor of the plaintiffs, the National Labor Court gave a long and pro-worker decision, in which it referred to the company’s practices as

¹³⁰ Adriana Kemp and Rivaka Rajjman, *Foreigners in a Jewish State—The New Politics of Labor Migration in Israel*, *supra* note 27.

¹³¹ “Worker’s Hotline”, The Annual Report, 2004 (on file with author).

¹³² *Xue Bin et al v. A. Dori*, 38 Piskei Din Avodah 650 (2003).

“immoral.”¹³³ It has also determined that “A. Dori” provided the workers with “minimal and poor” housing conditions,¹³⁴ and with food of such a low quality that it caused some of the workers to suffer from food poisoning. “A. Dori” was also found liable for demanding that the employees work extra hours and over the weekends, dramatically exceeding the hourly and day limits specified in the law, and for threatening workers’ families in China after the workers went on strike.¹³⁵

In another case, the “Worker’s Hotline” joined a case litigated by the Israeli Hotels Association (IHA), an organization representing the major hotel companies in the country.¹³⁶ The IHA signed a collective bargaining agreement with the Histadrut, in which migrant workers were precluded from receiving wages and benefits equal to those provided for Israelis. Arguing that the exclusion was void, the “Worker’s Hotline” pointed to constitutional principles of equality under Israeli law as well as to the Collective Agreements Law (1957), which prohibited the Histadrut from signing a collective agreement excluding non-affiliated employees such as migrant workers. This argument has not yet been decided.

A different legal venue which has been pursued by the “Worker’s Hotline” in individual cases is Administrative Law. With the enactment of the Administrative Courts Law in 2000, District Courts were authorized to hear petitions against governmental agencies previously heard by the HCJ. These petitions included cases on Immigration and Citizenship Laws. Therefore, the “Worker’s Hotline” started challenging many of the Interior Ministry’s regulations on migrant workers by using this new system. Some of these cases were successful and caused the Interior Ministry to issue new regulations.¹³⁷

¹³³ *Id.* at 692-693.

¹³⁴ *Id.* at paragraph 7.

¹³⁵ In its decision, the National Labor Court criticized the company for its conduct, and ordered that it will pay the workers 300,000 NIS (approx. \$63,800).

¹³⁶ A.G. Vista Hotels and Tourism v. Komar (The National Labor Court, Unpublished, November 3, 2004).

¹³⁷ During 2004, the “Worker’s Hotline” filed some 30 Administrative Court cases to assist workers in circumstances involving matters of legal status, detention and deportation. *See* the Annual Report, *supra* note 131.

At the public-policy level, the organization initiated or participated in the legal battle against the Binding System imposed on migrant workers,¹³⁸ and against the collection of commission fee from migrant workers recruited abroad by manpower companies.¹³⁹ However, as if to preserve its pioneering role in the Israeli workers' cause lawyering sphere, the "Worker's Hotline" also embarked on a new public campaign, aimed at corporations and entitled "*Civic Enforcement*."¹⁴⁰ This campaign has been based on the concept of "shaming," a strategy taken from international campaigns led by human rights, labor and environment activists. In the case of the "Worker's Hotline," it strove to publicly denounce employers and companies that violate workers' rights. The campaign consisted of gathering data, primarily court decisions rendered against specific companies which were found to be violating labor laws. These data are published on the organization's website—under the section entitled "*Corporate Responsibility*"—to call for a consumer boycott.¹⁴¹ On several occasions, the group's activists also engaged in a tactic known as "*Direct Action*," holding demonstrations in front of the offices of companies and the private homes of employers to protest workers' exploitation taking place in the firm.

Applying the "*Corporate Responsibility*" campaign to its legal activity, the "Worker's Hotline" focused on the "Hashmira" security company it had identified for several years as a central source of workers' rights violations. With over 15,000 employees, "Hashmira" is the biggest company operating in the Israeli private sector today. In 2002, as the demand for private security services reached its peak during the second Intifada (the Palestinian uprising), the company reported an annual turnover of \$185 million.¹⁴²

The same year, more and more complaints began to reach the "Worker's Hotline" from workers in the company, describing a routine pattern of abuse. These abuses appear to have arisen from a system called "*Profit Centers*," which was introduced by the company around that time. According to this system, upon

¹³⁸ *supra* note 94.

¹³⁹ *supra* note 98.

¹⁴⁰ http://www.kavlaoved.org.il/pages_en.asp?sivug_id=33 (last visited March 2006).

¹⁴¹ http://www.kavlaoved.org.il/acifa_ezrahit.asp (Hebrew) (last visited April 2006).

¹⁴² <http://www.hashmira.com/>.

which “Hashmira” prides itself, 50 branches nationwide are run autonomously by their regional managers. Managers are measured and compensated based upon the profits they have produced. Hence, the company gives a clear incentive for its executives to reduce costs and to increase profits.

Not surprisingly, increased profits have often been attained at the expense of employees.¹⁴³ Complaints made by workers indicated a daily and continuous violation of the protective labor laws, ranging from delays in paying wages to the denial of severance payments to unlawful fines being deducted from workers’ salaries. Thus, in the summer of 2002, the “Worker’s Hotline” initiated a meeting with senior managers at “Hashmira” to discuss these exploitative practices. Nonetheless, the meeting did not bear as much fruit as the organization had hoped it would: additional complaints continued to flow to the “Worker’s Hotline” as they had prior to the meeting.

Finally, in 2004, the organization applied to the Ministry of Justice to revoke the license issued for “Hashmira” as a security services provider. In its application, the “Worker’s Hotline” argued for a linkage between the exploitative practices and the company’s lack of responsibility in providing its clients with security:

[T]he majority of the company’s employees do not receive their basic rights according to the protective labor laws... if we expect every individual in our society to act in a lawful manner, let alone we expect it of employers, and even more of big and powerful employers—this expectation is ever more justified when it comes to matters of life and security... At present, private security companies are responsible for providing much of the public security services. Therefore, these companies should act fairly and with compliance with the law, as required both in their licenses and by the social necessity to trust those systems in charge of our security. In addition, the 8,000 workers of ‘Hashmira,’ who are actively employed as security guards, are actually part of the system maintaining public order in the country; thus, fairness, integrity and compliance with the law are naturally of great public interest.¹⁴⁴

¹⁴³ For the “Worker’s Hotline” report on “Hashmira” *see* under “Looking at a Company”: <http://www.kavlaoved.org.il/word/151004.html> (Hebrew) (last visited March 2006).

¹⁴⁴ Letter from the “Worker’s Hotline” to the Ministry of Justice (Oct. 17, 2004) (on file with author). The Ministry rejected the request on the grounds of references made by the Histadrut to

The campaign against “Hashmira” triggered additional campaigns against other corporations. Recently, the “Worker’s Hotline” has been gathering information on public companies with a record of workers’ rights violations. This information relates to companies registered on the Israeli stock exchange that are, therefore, obligated to abide by transparency rules under the corporate and securities laws. It includes the history of the company and the names of its shareholders being published on the website of the organization under the “*Corporate Responsibility*” section. Using this information, the organization has also written to corporate directors and executives, calling upon them to take action against managers responsible for workers’ rights violations.¹⁴⁵

Furthermore, the attorneys of the “Worker’s Hotline” have also applied corporate law mechanisms in some of their litigations. For example, they have used the concept of “Veil Piercing” to establish shareholders’ personal liability for violations of workers’ rights in individual cases. The legal concept of “Veil Piercing,” which will be addressed in detail in Chapter IV, is an exception to the rule regarding the *limited liability* of shareholders and the *separate legal personality of the firm*. It allows courts to lift the veil separating the corporation from its shareholders to view some or all of these shareholders as personally liable for the company’s misdoings. This concept also applies to labor and employment disputes heard in the Israeli labor courts.¹⁴⁶

For example, in the case of *H.Y. et al v. “Nitzanim” Company for Security and Projects Management*,¹⁴⁷ the “Worker’s Hotline” represented two security workers in their claim to recover overtime wages, annual leave, holiday compensation, convalescence pay, a pension fund, and severance pay. The claim described how the defendant company engaged in various means of denying the

indicate the company’s overall adequate conduct. Similar to the Nursing Companies case, this was another case in which a public-interest group—in this case, the “Worker’s Hotline”—had to confront the Histadrut, which decided to support the corporation rather than the workers’ claim.

¹⁴⁵ Telephone Interview with H, Manager, the “Worker’s Hotline,” in Tel Aviv, Israel (Jan. 13, 2006).

¹⁴⁶ Zilberstein v. “Erev Hadash,” 33(39) Piskei Din Avodah 35 (2002).

¹⁴⁷ District Labor Court – Beer Sheva – 1256/2005 *H.Y. et al v. “Nitzanim” Company for Security and Projects Management* (claim filed in 2005).

plaintiffs their basic rights, which included not providing the workers with pay slips, arbitrarily reducing their wages, transferring them to officially being registered as employed by a different company – all are common phenomena in the security industry.

The claim not only asked to recover wages and benefits or even punitive damages, but it also argued that the corporate veil should be lifted and that the shareholders of the defendant companies should be held personally liable for the misdeeds. Such a remedy, the group’s lawyers argued, should be rendered in light of the “basic inequality in the power relations between the employee and the employer,”¹⁴⁸ and in light of the fiduciary and good faith duties on the part of the holders of control and office holders in the corporation. The methods used by the shareholders, the claim concluded, justify the lifting of the corporate veil because they were—in the language of the Companies Law—“intended to frustrate the intention of any law or to defraud or discriminate”¹⁴⁹ against the plaintiffs.

After several months of litigating the case, the court rejected the motion to lift the corporate veil. Its decision was based on the plaintiff’s affidavits, which failed to directly connect the shareholders to violating the law. The case is still pending, but is currently being debated over the CEO’s liability for these violations.

However, cause lawyers at the “Worker’s Hotline” are convinced that Corporate Responsibility is, indeed, the most effective legal framework to pursue. Addressing corporations and their responsibility, they believe, is the key to performing better workers’ advocacy.¹⁵⁰ Through their eyes, applying CSR emerges from years of “field experience” with workers’ rights. “Addressing the responsibility of corporations is the most important and appropriate field for public-interest groups to pursue,” one of the group’s advocates mentioned, “and our group has, indeed, become the leading group to pursue it.”¹⁵¹

¹⁴⁸ *Id.* at 7.

¹⁴⁹ This Section of the Companies Law would be discussed in detail in Chapter IV.

¹⁵⁰ Interview with F, Attorney, the “Worker’s Hotline,” in Tel Aviv, Israel (Jan. 10, 2006).

¹⁵¹ Telephone Interview with H, Manager, the “Worker’s Hotline,” *supra* note 145.

3. The Forum for the Enforcement of Workers' Rights

The third group we will explore is a coalition formed in 2000 by the leading public-interest legal organizations engaging in workers' advocacy.¹⁵² The original name given to this coalition by its founders was "The Forum for the Enforcement of the Minimum Wage Law," but this has been changed to "The Forum for the Enforcement of Workers' Rights" ("The Forum"). The purpose of its creation was to allow the prominent public-interest groups dealing with workers' rights to *jointly* promote pro-labor policy change. Therefore, the Forum was created as a platform to lobby the Knesset and engage in public campaigns for workers' rights. In fact, it has addressed the same issues as those addressed by its member groups, but with two unique features: first, it has focused on lobbying for policy change rather than for litigation. Second, within its focus on policy change, it has prioritized the *enforcement* of existing labor laws, rather than the enactment of new ones.

The Forum does not employ any permanent legal staff. Its policy has been decided by several cause lawyers from the organizations which established the coalition. These cause lawyers write letters on behalf of the Forum, meet with members of the Knesset and the government, and to a lesser extent engage in litigation. The most successful activity of the Forum so far has been the enactment of an amendment to the Minimum Wage Law. The coalition's attorneys drafted a legislative bill to amend the Minimum Wage Law (1987) with respect to the following main components: (1) every employer would be obligated to hang a poster detailing the worker's right to a minimum wage, the rate of this wage, the legal sanctions for violating the law, and the ways to contact the department in the Labor Ministry in charge of enforcing it; (2) the burden of proof in minimum wage cases would shift from the plaintiff (i.e., the employee) to the

¹⁵²These include the ACRI, "Agenda—Israeli Center for Strategic Communications" (<http://www.agenda.org.il/>); "Commitment for Social Justice and for Peace;" "Halev—The Movement to Combat Poverty" (<http://www.halev.org.il/>); "Worker's Hotline," "Israel Women's Network;" "Itach—Women Lawyers for Social Justice;" and also the "Adva" Center and the Clinical Legal Program for Social Welfare Law of the Tel Aviv University Faculty of Law (<http://www.tau.ac.il/law/clinics/english/>).

defendant (i.e., the employer) to show that he has paid this wage; (3) a plaintiff who is employed by a *manpower* company would be allowed to bring suit against her *de facto* employer for violating her right to a minimum wage (as long as she would not recover more than 100% of this wage from both her *de jure* and *de facto* employers); (4) public contracts will not be given to companies that were convicted of violating the Minimum Wage Law during the five-year period prior to the bid.¹⁵³

In its letter to members of the Knesset presenting the bill, the Forum emphasized that new enforcement mechanisms are required because the existing Minimum Wage Law has constantly been violated.¹⁵⁴ Indeed, most of the provisions proposed by the Forum were enacted in 2002.

Following this achievement, the Forum has since focused on the issue of outsourcing, which it has identified as a major practice for workers' rights violations. For example, in 2004, the government proposed a bill encouraging employers to hire contract workers through manpower companies as part of "labor market flexibility." In its letter to all 120 members of the Knesset, the Forum argued that this bill would enable employers to hire workers as "temporary" workers almost indefinitely. This bill, the letter continued, made the dismissal of contract workers easier than ever: "[It] allows employers to treat workers as objects, which can be disposed of after use."¹⁵⁵ Eventually, after it failed to win the support of Knesset members, the government retracted its bill.¹⁵⁶

Motivated by the failure of the Histadrut to protect contract workers, the Forum also drafted and lobbied for the new *Liability of the De Facto Employer* bill. "Holding the *de facto* employer liable," the Forum wrote to members of the Knesset, "would prevent artificial transactions in which the only purpose of

¹⁵³ Violating the Minimum Wage Law is also a criminal offense according to Section 14 of the Minimum Wage Law (1987).

¹⁵⁴ Letter from the Forum to Members of the Knesset (Jun. 24, 2001) (on file with author).

¹⁵⁵ Letter from the Forum to Members of the Knesset (Sept. 21, 2004) (on file with author).

¹⁵⁶ Amiram Gill, *So How Much Does a Collective Agreement Worth for you?* HEVRA MONTHLY MAGAZINE FOR SOCIETY, ECONOMY, POLITICS, AND CULTURE, May, 2005 (Hebrew).

employing a worker via contracting is to avoid having employee-employer relations.”¹⁵⁷

The Forum chose to emphasize the fact that the bill does not impose employee-employer relations. Rather, “it suggests a simple reform to be easily implemented...it does not require state funding to increase law enforcement. It would create *natural market mechanisms for enforcement* (emphasis added)”¹⁵⁸ because the *de facto* employer would have an incentive to supervise subcontractor conduct.¹⁵⁹ Nonetheless, the bill did not pass, and in late 2005, the Knesset voted against it.

Also protecting contract workers, the Forum joined as “Amicus Curiae” in the case of *The Nursing Services Association v. the Institute for National Insurance*.¹⁶⁰ In this case, private nursing companies petitioned to reduce the benefits they were required to pay women workers as a condition for winning a state contract. These benefits included not only basic rights protected by the labor laws, but additional benefits, such as an increased pension and wider protections against dismissal. The Forum, on the other hand, argued that it is essential to protect these extremely low-salaried women workers: “the protective labor laws provide only for basic rights, whereas additional benefits can by all means be provided... such arrangements should be encouraged.”¹⁶¹

As the case was pending in the Jerusalem Administrative Court, the nursing companies signed a collective bargaining agreement with the Histadrut, which provided the workers with fewer benefits than those required by the state contract. Subsequently, the Forum wrote to the Chairman of the Histadrut to express its disappointment with the union’s decision to cooperate with the companies against the interests of the workers.¹⁶² Eventually, the court refused to

¹⁵⁷ Draft Bill *Liability of the De Facto Employer* (2005).

¹⁵⁸ Hannah Zohar, *Popular Programs for Enforcement*, THEMARKER, February 15, 2006 (Hebrew).

¹⁵⁹ On November 2005, the Knesset rejected the legislative bill 28:26 after the government announced its objection to it.

¹⁶⁰ Administrative Petition 1315/2004 *The Nursing Services Association v. The Institute for National Insurance* (The Jerusalem Administrative Court, Unpublished, July 3, 2005).

¹⁶¹ *Id.* See the Forum’s request to join as “Amicus Curiae,” December 26, 2004 (Hebrew).

¹⁶² Letter from the Forum to the Chairman of the Histadrut (Jan. 2, 2005) (on file with author).

accept the collective agreement and rejected the company's petition against the state contract.

Recent legislative bills which have been drafted by the Forum include criminal and civil sanctions against employers who unlawfully deduct fines from their workers' salaries and refuse to provide their employees with monthly pay slips.¹⁶³ In its letters to Knesset members, the Forum described these phenomena as exploitative practices which have become increasingly common in the Israeli labor market.¹⁶⁴ These bills will, therefore, be lobbied in the new Knesset, which was elected in March 2006.

C. EVALUATION OF CURRENT STRATEGIES

The effectiveness of current strategies pursued by workers' cause lawyers in promoting pro-workers social change has so far been extremely limited. Despite occasional achievements, public-interest advocacy on labor issues has not contributed to a meaningful change. Very few cases which were litigated in courts were concluded in pro-worker judicial decisions. Even fewer statutes were enacted as the result of public-interest lobbying. More specifically, of the 24 cases which were analyzed, only five reached the stage of a court decision accepting the worker's claim, one case was settled for a relatively small amount, one pro-worker law was enacted by the Knesset, and one anti-worker law which was proposed by the government did not pass. The remaining 16 cases were either rejected by the courts or the legislature or have not reached the stage of a decision.

Even more disappointing, the eight cases which could be considered to be "successful" did not engender *long-term economic welfare for workers*. They either addressed issues of employment discrimination without relating to working wages or conditions (e.g., *Danilovich v. El Al*), or violations of basic workers' rights (e.g., *Xue Bin v. A. Dori*), or enforced existing basic rights (e.g., the

¹⁶³ Both of these bills were proposed as amendments to the Wage Protection Law (1958).

¹⁶⁴ Letter from the Forum to Members of the Knesset (Dec. 12, 2005) (on file with author).

amendment to the Minimum Wage Law). None of these “successful” cases included a change in the legal rules which shape power relations between labor and management.

What explanations can we offer for this disappointing outcome? Naturally, many explanations can be attributed to the legal, ideological, and institutional characteristics of the judiciary and the legislature. Such explanations have been addressed to some extent in earlier parts of this paper. However, in evaluating the effectiveness of public-interest strategies, we must consider the shortcomings of the policy adopted by cause lawyers. Arguably, what is wrong with current strategies is that they reflect what one of the ACRI’s lawyers referred to as “putting out fires.”¹⁶⁵ In other words, these strategies have narrowed their focus only to violations of *basic* workers’ rights. As another attorney for the ACRI’s mentioned, “We focus on the protective labor laws. Arguing for anything exceeding those will be far-reaching in a reality where even basic rights are not enforced.”¹⁶⁶ Indeed, public-interest groups have seen their role as being the “final line of defense” for workers, not as promoting their long-term welfare.¹⁶⁷

The substantive legal positions adopted in legal cases have focused on the employer’s duty to comply with the protective labor laws and to act in good faith. They have also applied constitutional provisions related to equality, dignity, freedom of speech and occupation. Yet, they have not argued for a change in how corporations are run, how employers make long-term decisions about income distribution, and how the law should address labor-management relations.

It is true that the “Worker’s Hotline” has presented a somewhat different approach in recent years. This group has engaged in an interesting attempt to promote workers’ rights through *Corporate Social Responsibility*. It has also been the first group to apply corporate law mechanisms—namely, veil piercing—

¹⁶⁵ Interview with A, Attorney, the ACRI, *supra* note 107.

¹⁶⁶ Interview with B, Attorney, the ACRI, in Tel Aviv, Israel (Jan. 10, 2006).

¹⁶⁷ Even in the case of *the Nursing Services Association v The Institute for National Insurance*, the Forum argued for “slightly more” than the minimal safety net provided for workers. *See supra* note 160.

to hold shareholders personally liable for abusing their workers.¹⁶⁸ Unequivocally, these are all novel strategies in the Israeli public-interest field. Nevertheless, we should not misinterpret these strategies. Their goal has remained the same: protecting basic workers' rights against extreme violations. They have not been applied to advance long-term workers' welfare. Moreover, the "Worker's Hotline" has limited its use of corporate law mechanisms to those which have already been recognized by labor courts.¹⁶⁹

In light of this situation, where can workers' cause lawyers go from here? It appears that the first signs of change can be detected. Gradually, new language and discourse can be seen in the materials that cause lawyers file in courts. Public-interest groups are slowly acknowledging the existence of a basic distortion in the way power and income are distributed among corporate actors. More and more, cause lawyers refer to the ethos of profit-maximization as a source of workers' abuse (e.g., *A.P. v. S.A.S.*). They also suggest holding private companies liable for obligations under public law (e.g., *X v. "Adam" Institute*).

Therefore, it is time for workers' cause lawyers to turn their "gut-feelings" into concrete legal strategies. It is time to set the foundations of a new frontier.

¹⁶⁸ A report prepared by one of the group's attorneys proposes creating legal mechanisms to force corporations to place a deposit guaranteeing their workers' rights, requiring the regulator to examine records of prior business conduct as a precondition to approving the creation of new companies, and to provide unpaid workers with larger procedural possibilities to sue for their company's liquidation. *See* Report prepared by Adv. Racheli Idelevich, the "Worker's Hotline," 2005 (on file with author).

¹⁶⁹ For example, when arguing for veil piercing, the group's lawyers limited their argument only to those harsh cases in which lifting the corporate veil was necessary in light of the almost-criminal tactics used by the company.

CHAPTER III

SETTING THE FOUNDATIONS OF A NEW FRONTIER

A. WHY A NEW FRONTIER?

There is a considerable gap between the problems which corporate workers are currently facing in Israel and the strategies adopted by public-interest groups to address them. While income inequality has been increasing, cause lawyers have focused on basic workers' rights. Those rights, even if provided by means of better enforcement and compliance with the law, would not change the fundamental distortion in income allocation. Therefore, new approaches should be pursued to deal with this fundamental problem *from its very roots*. Cause lawyers should identify gaps in income as the most serious threat to workers' welfare in the long-term, and the traditional corporate structure as the system which allows it.

Existing tools are limited in addressing these challenges. Namely, the protective labor laws would only bring workers as far as achieving their basic rights. Constitutional litigation and human rights law would hardly allow income redistribution. Administrative law cannot be applied to address non-state actors such as corporations. Binding private companies to comply with obligations under public law will be ineffective in challenging the social-economic status quo. Hence, a new frontier for cause lawyering should be pursued.

Southworth shows how in the United States progressive scholars continue to struggle to define constructive roles for cause lawyers even though the political left has lost faith in these lawyers' capacity to promote change.¹⁷⁰ Bloom suggests personal injury litigation as a new frontier in the struggle for Multi-National Corporations (MNCs) responsibility.¹⁷¹ In Israel, attempts have been

¹⁷⁰ Southworth, *supra* note 1, at 1267.

¹⁷¹ Anne Bloom, *Taking on Goliath: Why Personal Injury Litigation May Represent the Future of Transnational Cause Lawyering*, in *CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA* 96 (Austin Sarat and Stuart Scheingold eds., 2001).

made to suggest Community Economic Development (CED) as a new framework for cause lawyers to empower disadvantaged groups.¹⁷²

Therefore, it seems that after suffering several years of discouragement, the cause lawyering movement is awakening to find new ways for law to engender change. As we search for such new ways, we cannot avoid the question: are law and cause lawyering, in fact, capable of advancing change? More specifically, can they bring about income redistribution?

B. CAN LAW AND CAUSE LAWYERING BRING ABOUT INCOME REDISTRIBUTION?

1. Law and Income Redistribution: a Dichotomy?

The question regarding whether legal tools can be applied to promote social change, in general, and income distribution, in particular, has been widely debated. This debate has gone to the very roots of the law, giving voice to a variety of philosophical, sociological and political approaches. Neo-Marxist, realist and critical legal approaches have played a key role in this debate. However, this paper will not address the general features of this debate. Rather, it will point to several core perceptions regarding the possibilities to advance income redistribution through legal systems and mechanisms.

Naturally, issues of redistribution between labor and capital immediately situate themselves in *Marxist* and *neo-Marxist* contexts. However, law plays very little role in this school of thought. In fact, law is merely a small part of the materialist analysis, “little more than noise in the system.”¹⁷³ Therefore, reducing legal power to less than what serves the ruling classes is impossible in the long term. Nevertheless, according to neo-Marxist approaches the internal contradictions, and clashes within the capitalist system, might turn law into “the

¹⁷² Michal Aharoni and Galia Pit, *From a Rights Agenda to Economic Development*, in *LAW AND SOCIAL WELFARE* (Guy Mundlak ed., Forthcoming, 2007); AYELET ILANY, *GROWTH FROM A DIFFERENT DIRECTION* (Shatil, 2005).

¹⁷³ *LAW & SOCIETY: READINGS ON THE SOCIAL STUDY OF LAW* 232 (Stewart Macaulay, Lawrence M. Friedman, John Stookey eds., 1995).

ground for struggle.”¹⁷⁴ Moreover, these contradictions may cause law to allow social change under certain circumstances, or at least to be “seen” as allowing it.

For example, according to Neo-Marxists, the capitalist class might “buy off” parts of the working class through laws which benefit labor.¹⁷⁵ Gaps in the capitalist concept of private property may lead to a limited reform through law, and judges might decide some cases against their own class interests to maintain the image of law as being “class neutral.”¹⁷⁶ Indeed, the fact that the legal system is “relatively autonomous” may provide workers with occasional achievements,¹⁷⁷ even if it does not radically change the balance of powers.

Following this complexity, several scholars have shared the notion of drawing a thin line between “optimism” and “pessimism” (to use these popular definitions) in identifying the role of law in advancing social change. Calavita, for example, argues that the potential of law to trigger social change has been overestimated. Economic, political, and class contradictions, she believes, are more important in this regard.¹⁷⁸ Calavita notes how law is seen not as the product of state structure but rather as the outcome of contradictory political and economic forces. Therefore, she suggests that in motivating social change, legal phenomena should not necessarily be regarded as central.¹⁷⁹

In his classic article on *Why the “Haves” Come Out Ahead*,¹⁸⁰ Galanter identifies the way in which the basic architecture of the legal system creates and limits the possibilities of using it for redistributive change. According to his famous analysis, repeat players (“RPs”), which originate among the strongest segments of society (e.g., insurance and finance companies), frequently engage in litigation. Hence, RPs use their easy access to the legal system and representation by top attorneys to enjoy a better bargaining position. Consequently, the legal

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE 282 (1997).

¹⁷⁷ *Id.*

¹⁷⁸ Kitty Calavita, *Worker Safety, Law, and Social Change: The Italian Case*, 20 LAW & SOC’Y REV. 189, 190 (1986).

¹⁷⁹ *Id.* at 191.

¹⁸⁰ Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974).

system is influenced first and foremost by RPs, who have succeeded in maintaining the legal rules constructed in their favor.¹⁸¹

Galanter's theory assumes that changing legal rules through the courts will have little effect on how the system really works, because the system will "filter out" the change. The only chance for change to take place is if new legal rules are accompanied by changes at *other* levels, namely the reorganization of the legal profession to become more favorable to the weak.¹⁸²

However, it appears that as we move away from the classic positions on class structure (i.e., Marxist and neo-Marxist positions), law becomes more likely to allow social change. The Legal Realism movement, for example, offers an analysis of institutional economics according to which legal rules play a considerable role in the allocation of income and power among social classes. For example, in his analysis of the works of Robert Hale and Michel Foucault, Duncan Kennedy examines the importance of law in efforts to make income distribution more equal. Law, according to his analysis, provides us with the "rules of the game of economic struggle."¹⁸³ Naturally, this is not law's exclusive goal but nevertheless legal language states distributive rules. Rules governing the bargaining relations between workers and capitalists over wages are crucial factors in determining how income is distributed among social classes.

Indeed, unlike Marxists, realists believe that labor-capital bargaining reflects not only the absolute freedom of capital to impoverish labor, but also a much more complicated situation in which each side acts within its own constraints and both parties engage in practices of coercion, causing harm to the other side. Eventually, each side has very few alternatives to cooperation. Therefore, law provides the parties with the rules of the game to bargain over a joint product. Consequently, judges influence income distribution when they

¹⁸¹ *Id.* at 95-105.

¹⁸² *Id.* at 149.

¹⁸³ Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!* 15 LEGAL STUD. FORUM 327 (1991).

decide cases concerning labor-management bargaining relations because the rules governing the bargaining process result in specific forms of income allocation.¹⁸⁴

Furthermore, a set of ground legal rules defines for people cooperating with each other in production what is allowed and not allowed when fighting over the product. Modifying such ground rules frequently causes the economic outcome to be dramatically modified as well. Subsequently, law is responsible for the outcome of distributive conflicts among classes.¹⁸⁵

Taking the realistic approach, workers' cause lawyers should see the potential of legal rules to shape power relations and consequently to bring about different distributional outcomes.¹⁸⁶ This is not to say that law alone will engender change; we can be certain that it will not, and that social and political work is no less crucial.¹⁸⁷ However, reshaping legal rules should be an important step in the journey toward change.

2. Litigation: a Promise or a Disappointment?

The development of cause lawyering in the United States during the 1960s inherently focused on litigation as a tool for social change. Cause lawyers chose clients and litigated on their behalf. Those lawyers were viewed as social agents, promoting liberal ideology and pursuing political, social and economic change. Litigation was then considered to be a channel to advance change through the courts without challenging the fundamental values of the political system. The very use of litigation symbolized lawyers' acknowledgment of the fact that arguing a case will be conducted within the existing boundaries of the state legal system and its procedures.

¹⁸⁴ For example, in cases dealing with strikes, lockouts and boycotts, the court might decide whether the property rights of the employer trump the workers' right to organize and enter the plant against the employer's will, an individual worker-employer contract that supersedes a collective bargaining agreement will be enforced, the remedy for an unfair labor practice will be limited to back pay, and an injunction against future violation would be rendered. *See Id.* at 328-330.

¹⁸⁵ *Id.* at 331-332.

¹⁸⁶ *Id.* at 341.

¹⁸⁷ For a discussion on the limits of the legal system to affect bargaining behavior *see Id.* at 346.

Over the years, litigation has been heavily criticized for the limitations it imposed on cause lawyers. The critique has focused on the limited ability of litigation to bring about social change and on the fact that litigation weakens clients instead of empowering them. According to critics, legal tactics absorb scarce resources that could have otherwise been used for social mobilization. The absorption of these resources by litigation makes it even more difficult to develop grass-roots associations of active citizens. In addition, critics argue that masses of people create social change while cause lawyering blurs the need for such a popular movement because it focuses on lawyers and their professional skills. Furthermore, critics note that cause lawyers tend to overlook the complexity of social struggles and wrongly focus on litigation instead of pursuing legislative reforms through political lobbying.¹⁸⁸

Another example to the critical perspective on litigation can be found in Rosenberg's work. His work shows how the hopes which were pinned on courts in issues of racial segregation, discrimination, criminal and environmental rights turned as "hollow hopes."¹⁸⁹ Litigation did not succeed in providing a remedy to the poor in the long-term, nor did it increase the availability of employment, housing, education or health services to disadvantage communities.

Galanter joins this line of critique. He writes about the limited capacity of courts to engage in comprehensive social change, even when they allow certain changes in legal rules. According to Galanter, to implement new legal rules, strategies must include increasing the costs of the "haves" by, for example, authorizing class actions and awarding attorneys fees or provisional remedies.¹⁹⁰ These new strategies require a change in the organization of the legal profession: lawyers should be willing to undertake new tasks, form alliances with clients, and operate in forums other than in courts.¹⁹¹

Additional objections to litigation were heard during the 1980s and 1990s. Scholars have pointed to the dangers of lawyer domination and paternalism

¹⁸⁸ Southworth, *supra* note 1, at 1266.

¹⁸⁹ GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

¹⁹⁰ Galanter, *supra* note 180, at 150.

¹⁹¹ *Id.*

toward clients.¹⁹² “Dragging” clients into courts was said to reinforce the client’s experience of powerlessness. Therefore, scholars have called upon lawyers to shift the focus from their own pursuit of legal strategies to giving clients a bigger “say” in decision making. White, for example, notes that litigation has wrongfully replaced community organization, whereas the road to social change must come through a creative endeavor to cooperate with the client by identifying both her problem and ways to address it.¹⁹³

Nonetheless, litigation is still on the agenda. Even in the United States, where liberals have allegedly lost faith in lawyers' capacity to contribute to significant social change, lawyers, activists and scholars are still committed to pursuing social change through litigation.¹⁹⁴ This is also true in the Israeli case. In fact, the cause lawyering movement in Israel has grown to become *the* substitute for the absence of a political left committed to social change.

Israeli public-interest legal organizations have been engaged in variety of policy issues during the past few decades, addressing topics which were almost totally ignored by political parties. Moreover, the most controversial issues in Israeli politics—from human rights in the Occupied Territories to welfare reform to police violence and government discrimination against Israeli Arabs—all were addressed first and foremost through litigation by public-interest groups. The most significant achievements of the Israeli social change movement in recent years—limited and unsatisfactory as they may be—took place in courts, as a result of public-interest litigation, rather than in the Knesset or in the government. Therefore, litigation is currently and is bound to remain the main tool used by Israeli lawyers to effect change in the coming years.

¹⁹² Southworth, *supra* note 1, at 1267.

¹⁹³ Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699.

¹⁹⁴ Southworth gives the examples of the literature on the CED movement, as well as the following works: Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004); Martha Minow, *Political Lawyering: An Introduction*, 31 HARV. C.R.-C.L. L. REV. 287 (1996); William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127 (2004); Louise Trubek & M. Elizabeth Kransberger, *Critical Lawyers: Social Justice and the Structures of Private Practice*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 201, *supra* note 2; *Symposium, Constitutional Lawyering in the 21st Century*, 9 J.L. & POL'Y 297 (2001).

In addition, if we identify fundamental legal rules as the key problem, then litigation might very well be the most effective tool to change them. More specifically, the *Shareholder Primacy Model* is not merely a public policy or a business ethos. It is also a legal rule embodied in many years of adjudication. Therefore, changing this rule does not necessarily call for new legislation but rather for litigation aimed at creating new principles to guide the Israeli judiciary.

However, even if litigation is indeed the right tool to apply, are public-interest legal organizations the appropriate entities to apply it?

C. ARE PUBLIC-INTEREST GROUPS THE SUITABLE ACTORS TO LEAD A MOVEMENT FOR INCOME REDISTRIBUTION?

When establishing the foundations of a new frontier, we should not only ask ourselves what kind of change we want and how can we achieve it, but also who should be the agent of this change? Are the agents which have successfully litigated human rights over the years those who should litigate corporate-labor claims?

Indeed, for public-interest groups, representing workers is far different than representing plaintiffs in classic human rights cases. The interests of workers are not always clear, nor are they as decisive as in matters concerning universal human rights. In addition, labor relations involve more economics than morals; the state is often not the opponent but rather private parties; litigation is not necessarily in the interest of workers but rather individual or collective bargaining is; and a rights approach often limits itself to the responsibility of the state rather than a labor approach which affects the industrial relations in the private market.

Therefore, the shift from workers' representation by unions to their increasing representation by public-interest groups raises a series of challenges. We will now address several of these dilemmas.

1. Public-Interest Groups in an Era of Privatization: Agents of Change or Corporate Pawns?

The first dilemma we will explore concerns the nature of public-interest groups as private entities, often supported by corporate donors. In fact, some have argued that these groups' engagement in social and economic issues is part of the problem, rather than the solution.

Gutwein, for example, argues that with their nonpartisan nature, these groups maintain the existing social and political order. According to his analysis, NGOs, such as the ACRI, avoid political affiliations or commitments because they are dependant on private donors. The result, Gutwein believes, is a paradox: the more successful public-interest groups are, the less chance there is of promoting real change. Not surprisingly, he concludes, private donors—all of whom are the beneficiaries of privatization—have an interest in supporting public-interest groups in order to keep any political movement (be that a political party or a trade union) too weak to promote real change.¹⁹⁵

A similar argument was made in the context of the American movement for social change during the 1960s and 1970s. According to critics, the struggles led by public-interest groups have caused the public to believe that social justice will not be achieved through political change, but rather through the legal activity of NGOs. Consequently, privatization and the government's abandonment of its commitments were publicly strengthened.¹⁹⁶

These critics might very well be true. However, when it comes to the case of Israel, they tend to ignore the fact that public-interest groups have been the *only* actors to challenge the economic policy in recent years. They have been the only ones to oppose the neo-liberal consensus in Israel. Neither the Histadrut nor any influential political party had engaged in a continuing daily effort to reject

¹⁹⁵ Dani Gutwein, *The Politics of Inequality*, a presentation to the education department of the ACRI, February 2005 (Unpublished).

¹⁹⁶ Susan Jones, *Symposium Issue: Lawyering for a New Democracy: Current issues in the Changing Roles and Practices of Community Economic Development Lawyers*, 437 WIS. L. REV. 439 (2002). This line of critique has been particularly discussed in the context of the CED movement. See Cummings, *supra* note 10.

decisions on privatization and on anti-welfare reforms as much as public-interest groups did.¹⁹⁷

In fact, the Histadrut has focused on achieving better compensation for workers in privatized companies rather than opposing the privatization policy itself. It has also bargained for new collective agreements in the private sector, often “cutting deals” which were highly controversial with employers.¹⁹⁸ The Labor Party has embraced neo-liberalism as part of its agenda during the 1990s and 2000s. The liberal-left party “Meretz” actively took part in the neo-liberal policy led by the labor governments in the 1990s, and its voice has hardly been heard on these issues since. Hence, public-interest groups have become the “battlefront” against the Israeli adoption of the “Washington Consensus,” leaving trade unions and political parties far behind.

Another dilemma with regard to public-interest groups as possible “corporate pawns” concerns their funding by private donors and the potential interference of these donors in organizational decisions. Questions of this kind have recently occupied leading groups in the United States, such as the ACLU.¹⁹⁹ Indeed, public-interest legal organizations are usually supported by private donors and foundations, which are in many cases related to corporations.²⁰⁰

In the American case, scholars have argued that being dependant on external funding, public-interest groups must be responsive to donors while, simultaneously, having a professional, ethical and sometimes legal obligation to the workers they represent. Presumably, public-interest advocates enjoy the freedom to find “the golden mean” to bridge these obligations.²⁰¹ However, this freedom is subject to diversions and a source of many difficulties and dilemmas. Jolls, for example, distinguishes between “national issues organizations,” which

¹⁹⁷ For example, the ACRI and the Legal Clinic of the Academic College of Law in Ramat Gan have been the only groups to oppose and to litigate against prison privatization, and the Movement for Quality Government in Israel (<http://www.mqg.org.il/>) has conducted numerous cases against privatization procedures of governmental companies.

¹⁹⁸ Gill, *supra* note 156.

¹⁹⁹ Stephanie Strom, *Rift Emerges at A.C.L.U. on 2 Big Issues*, THE NEW YORK TIMES, December 8, 2005.

²⁰⁰ Mundlak, *supra* note 30, at 100.

²⁰¹ Richard B. Freeman and Joni Hersch, *Introduction*, in EMERGING LABOR MARKET INSTITUTIONS FOR THE TWENTY-FIRST CENTURY 3, *supra* note 11.

focus on high-profile, publicly-charged issues (e.g., discrimination), and seek to change public policy, and “legal services centers” that handle a large number of cases on less controversial issues concerning daily practices in the labor market.²⁰² Jolls argues that groups which focus on policy change choose to promote issues that attract private donations. As a result, low-wage workers—who primarily have access to the legal services centers—are unlikely to have legal representation for a fundamental policy claim.

Interestingly, in Israel—as we have seen in Chapter II—public-interest groups promoted almost solely high profile cases for many years, but this trend has changed. They are currently engaged in a variety of advocacy cases, representing hundreds and thousands of individual, low-wage clients. New organizations, such as “Yedid” and “Community Advocacy,” have also opened legal services centers in addition to their public policy campaigns. Private funding has so far been the fuel in expanding both high profile litigation as well as legal services for low-wage workers.

Israeli cause lawyers themselves do not see donor interference in their decision-making as a real danger. They believe that their independence is well-established and that donors who support advocacy groups are not likely to interfere in their work after having already decided to donate.²⁰³ Some lawyers have mentioned that most donors to Israeli groups are often foreign foundations, which are not directly related to Israeli corporations.²⁰⁴

However, one should bear in mind that these optimistic notions can be attributed to the fact that public-interest groups have so far not confronted issues which donors might find to be economically threatening. For example, donors who decide to support the ACRI for its campaigns to protect Israeli Arabs from land discrimination are politically committed to this cause and are not intimidated by the effects it might have on their businesses. Yet, if the ACRI decides to

²⁰² Christine Jolls, *The Role and Functioning of Public-Interest Legal Organizations in the Enforcement of the Employment Laws*, in EMERGING LABOR MARKET INSTITUTIONS FOR THE TWENTY-FIRST CENTURY 141-176, *Id.*

²⁰³ Interviews with A, Attorney, the ACRI, *supra* note 107; B, Attorney, the ACRI, *supra* note 166; and C, Attorney and Executive Director, the ACRI, in Tel Aviv, Israel (Jan. 10, 2006).

²⁰⁴ Interview with E, Attorney, the ACRI, in Tel Aviv, Israel (Jan. 10, 2006).

litigate a case challenging shareholder primacy in a corporation, the same donors might no longer support the ACRI or even condition their future support on the ACRI dropping the case. Some cause lawyers have acknowledged this difficulty; they believe that it may become a problem if their groups will further engage in corporate-labor policy issues.²⁰⁵

Cause lawyers' approaches signal an optimistic, arguably though naïve take on the problem: we were always committed first and foremost to our agenda, they say, and we will remain so regardless of any pressure placed on us.²⁰⁶ Naturally, this approach has yet to be tested "in action." Nevertheless, the long tradition of independence among Israeli public-interest groups may justify the optimism that such groups will, indeed, not allow external interference to affect their policy.

2. Workers' Representation by Non-member Organizations (NMOs)

Another dilemma concerns the nature of public-interest groups as non-member organizations (NMOs). Unlike unions, public-interest groups are inherently distant from the workers they represent. For example, Freeman and Hersch observe that what is distinctive about NMOs is that they select their clients, a reversal of the relation in the standard principal-agent model, in which the clients select the lawyers or the activists to represent them.²⁰⁷ This freedom to select cases and plaintiffs might create conflicts between the commitment of these groups to *their own agendas* on the one hand and *promoting the cause of workers clients* on the other.

In contrast to the centralist-collectivist nature of a union, public-interest groups act separately, each with its own policy and selection of clients. Furthermore, their activists—most of whom are lawyers—are not elected,²⁰⁸ and

²⁰⁵ Interview with D, Attorney, the ACRI, in Tel Aviv, Israel (Jan. 10, 2006); Telephone Interview with H, Manager, the "Worker's Hotline," *supra* note 145.

²⁰⁶ Interview with H, Manager, the "Worker's Hotline," *Id.*

²⁰⁷ Richard B. Freeman and Joni Hersch, *supra* note 11.

²⁰⁸ Mundlak, *supra* note 30, at 100-102.

they often see workers' advocacy as a new trend in cause lawyering, not as a distinguished feature of many years of activity.

Israeli cause lawyers believe that there is not an institutional problem with workers' representation by NMOs. As one lawyer mentioned, "the Histadrut does not really represent them, so we can just as well do it".²⁰⁹ However, these lawyers do identify a political problem. "For the long-term," one lawyer argued, "only the union can try and change what is happening in the labor market."²¹⁰ Another lawyer mentioned that the more "economic" the issues addressed by his organization become, and the less related they are to "classic human rights," the more representing such workers becomes difficult.²¹¹

Another attorney asked, "Who are we representing to begin with and who authorized us to make decisions on behalf of workers?" He concluded, "The key to change is association and union representation. If we engage too much in workers' advocacy, we might harm this only chance for change."²¹²

Understandable as they are, these fears reflect the difficulty of workers' cause lawyers to fully acknowledge their new role as actors in the labor market. In this new reality, workers' representation by public-interest groups is here to stay. It is not a temporary arrangement until unions will return to lead the battle. Viewing their role as workers' advocates as a "part time job" would be just the same as waiting for political parties to promote minority rights. Moreover, with privatization expanding, public-interest groups are bound to become even more influential in the labor market since union density is likely to continue falling in the coming years.²¹³

In addition, the dilemmas emerging from workers' representation by NMOs are not substantially different from those emerging from any other field of

²⁰⁹ Interview with F, Attorney, the "Worker's Hotline," *supra* note 150.

²¹⁰ Interview with A, Attorney, the ACRI, *supra* note 107.

²¹¹ Interview with D, Attorney, the ACRI, *supra* note 205.

²¹² Interview with I, Former Attorney for the ACRI, in Tel Aviv, Israel (Jan. 9, 2006).

²¹³ Workers' cause lawyers should therefore not only acknowledge this new reality but also develop mechanisms to adjust to it. One of the ACRI's lawyers, for example, suggested creating channels of cooperation and communication with the Histadrut on workers' issues; he also suggested creating a strike damages insurance fund—similar to funds run by unions—to support striking workers represented by the ACRI. *See* Interview with D, Attorney, the ACRI, *supra* note 205.

cause lawyering. In other words, workers are not necessarily different from other clients when it comes to having public-interest attorneys representing their group. As in other cases, cause lawyers might ask themselves what should come first—their loyalty to their individual client (e.g., agreeing to settle the case) or their commitment to the political cause (e.g., refusing to settle a case which raises a fundamental moral and legal questions). How can a cause lawyer adequately make decisions which would affect a larger group than her own client? How can a cause lawyer representing a client express the genuine interests and desires of this client's group? How—if at all—should a cause lawyer be affected by belonging to the group she is representing (e.g., an Arab lawyer representing Arab clients)? How should she be affected by belonging to a different group (e.g., a Jewish lawyer representing Arab clients)?

All of these questions and many others have been the subject of an ongoing debate in the research literature on cause lawyering,²¹⁴ as well as among Israeli cause lawyers themselves.²¹⁵ Therefore, dilemmas of representation are inherent to cause lawyering. Nevertheless, they should not serve as an excuse to justify the lack of representation. As Luban writes:

[S]he shares and aims to share with her client responsibility for the ends she is promoting in her representation...Cause Lawyers...reconnect law and morality and make tangible the idea that lawyering is a 'public profession,' one whose contribution to society goes beyond the aggregation, assembling, and deployment of technical skills....The politically motivated lawyer, acts ethically not by evading the essentially political character of relationships but by responsibly representing the political aims of her entire client constituency even at the price of wronging individual clients. The Key point is that a responsible representative must keep one eye on the interests of future generations.²¹⁶

²¹⁴ William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L. J. 1623 (1997); Nancy D. Polikoff, *Am I My Client: The Role Confusion of a Lawyer-Activist*, 31 HARV. C.R.-C.L. L. REV. 443 (1996); Austin Sarat & William L.F. Felstiner, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447 (1992).

²¹⁵ Dori Spivak, *Condoms on Buses: On the Process of Settling a Freedom of Expression Case*, in THE LEGAL CULTURE OF FREEDOM OF EXPRESSION IN ISRAEL (Michael Birenhak ed., 2006); Neta Ziv, *Lawyering for the Public Interest: Who is the Public? What is the Interest? Professional Dilemmas in Representing Minority Groups in Israel*, *supra* note 19.

²¹⁶ DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* xxii, xxv (1988).

Arguably, workers' cause lawyering has a clear advantage over union representation: public-interest groups are committed to challenging fundamental legal rules much more than trade unions. Unions by their very nature tend to focus on bargaining with employers over wages and working conditions. They not only work within the existing system but they also tend to make far-reaching compromises, which maintain the labor-management status quo. This is especially true in a time where Israeli unions are fighting for their very existence; in recent years, the Histadrut not only signed controversial collective bargaining agreements, but it has also shown no sign of interest in demanding long-term plan that would grant a larger place for workers in corporations. Recently, the Histadrut has even engaged in a campaign to gain support for its role as a collective bargainer from no other than employers, making it even harder to believe that challenging corporate structure is part of its agenda.

Public-interest legal organizations, on the other hand, have clear ideological agendas to which they are committed. They also have wide experience in constitutional litigation and lobbying, which provides them with clear advantages in pursuing more comprehensive legal change. Lawyers working for these organizations are professionally trained and oriented toward impact litigation. Hence, by definition, Israeli public-interest groups are not there to bargain. They are there to change legal rules, which is exactly what they should do with corporate law.

3. Public-Interest Legal Organizations as Rights-Consciousness

The last dilemma we will explore in this chapter concerns the difficulty of public-interest groups to transform from a rights-agenda to a corporate-labor agenda. As described in Chapter II, Israeli public-interest groups have focused for many years on violations of human rights by the state. Even part of their workers' advocacy in recent years has been conducted vis-à-vis the state.²¹⁷ Can

²¹⁷ Rajjman and Kemp, *supra* note 27.

these groups transform themselves to deal with labor issues in the private and business sectors? Naturally, this transformation is not simple.

Despite social and political changes, Israeli cause lawyers still tend to identify the state as their opponent and the rights-discourse as their conceptual framework. Furthermore, cause lawyers—even those dealing with corporate workers issues—share professional backgrounds of constitutional law, not private law. The language they speak and the professional tools they know best are constitutional ones. As one of the ACRI’s lawyers said, “As far as we are concerned, litigating with state employers is still the key to promote new ethics and set an example for private employers.”²¹⁸

Another lawyer of the ACRI commented, “I believe the solution to workers’ problems we are facing is to adopt new state regulation...I admit that this focus on the state is conservative. I guess it takes time to think of new approaches, such as the one in the ‘*Polgat*’ case. It is easier to think of the concepts and tools you already know best.”²¹⁹ A third lawyer in the ACRI mentioned that “with all our desire to move toward new approaches, classic human rights litigation is still what we do best.” However, this lawyer went on to argue that “nevertheless, we do not owe anything to the classic liberal perception. We should examine each individual case to see how and if to use this perception.”²²⁰

This observation captures the way in which cause lawyers are gradually adapting to the new reality, in which old instruments do not prove themselves adequate in changing environments. Ideologically, cause lawyers are bound to acknowledge the need to address non-state entities as they go along. Moreover, they are bound to realize that protecting human rights in an era of globalization means engaging in labor-management issues which exceed the classic rights-discourse.²²¹ As for the notion that lawyers often lack professional knowledge in

²¹⁸ Interview with B, Attorney, the ACRI, *supra* note 166.

²¹⁹ Interview with A, Attorney, the ACRI, *supra* note 107.

²²⁰ Interview with D, Attorney, the ACRI, *supra* note 205.

²²¹ This paper does not address the classic critiques on the rights-discourse. For work done on these critiques in their Israeli context, see Ziv, *supra* note 19.

labor and corporate law, this of course can be changed and improved by professional training.

Another difficulty which emerges from the interviews with Israeli public-interest lawyers concerns litigating against corporations. Corporate lawyers, as one interviewee mentioned, often argue that corporations have no obligations or liabilities under public law.²²² Therefore, cause lawyers are required to dedicate a fair amount of their work to establishing legal arguments to simply impose various obligations on corporations. However, binding private entities to comply with obligations imposed by public law may introduce new and effective tools to hold corporations responsible. In fact, this has been the road taken so far both by Israeli justices applying public law to private parties, as well as by cause lawyers litigating with corporations.²²³ This approach can serve as a bridge for cause lawyers to apply private law in a later stage.

Concluding this chapter, we should note that *progressive lawyering* also means progressing beyond the traditional rights-approach. Income redistribution in a corporate environment should be identified as a task that, for promoting social change, is as important as any other task, if not more important. New frameworks outside the rights-discourse should be applied. “Corporate law,” as one of the ACRI’s attorneys mentioned, “might serve as an effective mechanism in promoting workers’ rights. But so far we have not thought about it at all.”²²⁴ Therefore, the next chapter suggests new ways for cause lawyers to think about corporate law.

²²² Interview with I, Former Attorney for the ACRI, *supra* note 212.

²²³ Some cause lawyers share this belief. *See* Interview with D, Attorney, the ACRI, *supra* note 205.

²²⁴ Interview with E, Attorney, the ACRI, *supra* note 204.

CHAPTER IV

THE NEW FRONTIER: PROGRESSIVE CORPORATE LAW

A. WHY CORPORATE LAW FOR ALL LEGAL FIELDS?

Typically, corporate law is not the first legal field which comes to the minds of cause lawyers as a framework for social change. To many of them, corporate law and governance symbolize the “cold” world of business, rather than social struggles. It reminds them of terms such as “stocks,” “shares,” and “profit” rather than “rights,” “welfare” and “change.” Nevertheless, these perceptions are arguably even better reasons for cause lawyers to use corporate law. That is, speaking the language of the other side can be effective in confronting it.

Moreover, traditionally, lawyers have tended to distinguish between frameworks. On the one side, they see the rules governing the relations between shareholders and managers (“corporate law”). On the other side, they see the rules regulating the workplace and protecting employees (“labor” and “employment law”). This distinction is outdated. In fact, such traditional legal classifications can no longer be maintained in corporate economies, in which labor markets are constantly changing their form—such as those in Israel.

Corporate law and governance shape industrial relations as much as labor and employment law—if not more. In addition, while labor law provides workers with protections, corporate law organizes the power structure in the corporate workplace. Some have even argued that labor law doctrine and discipline, because of their protective nature, reflect and reinforce discourses which negate redistribution and maintain the economic status quo.²²⁵

As a more general observation, the pursuit of redistribution by legal means, especially in an era of globalization, cannot and should not be limited only

²²⁵ Lucy A. Williams, *Beyond Labour Law’s Parochialism: A Re-envisioning of the Discourse of Redistribution*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES* 93-114, *supra* note 85.

to certain legal fields and not to others. Therefore, the names we give various legal fields are not important. What is important is identifying the most appropriate tools available within these fields and using them: “Once there is a legal system, the choice of any particular set of background rules is a choice of a set of distributive outcomes....”²²⁶

In our case, corporate law and governance are the key legal fields in which distributional decisions are actually made, affecting workers both in the short-term as well as in the long-term. Corporate law “produces the fabric of governance of our most important and powerful institutions other than government.”²²⁷ Therefore, the legal rules of corporations must be changed from their very roots to promote the workers’ welfare.

Not surprisingly, as the face of global labor market is transformed, more and more scholars and advocates have addressed the corporate arena and its labor-management relations.²²⁸ Institutions of “Workplace Democracy” have been designed to make workers more influential partners in the firm, ranging from Employee Stock-Ownership Programs (ESOP)²²⁹ to Co-determination²³⁰ (giving voting rights and representation to workers on corporate boards). Corporate codes of conduct have also drawn the attention of labor law scholars as mechanisms of ensuring fair labor standards.²³¹

Based on these new trends, scholars have suggested strengthening the progressive voice within corporate law by forging alliances with other progressive social movements. For example, Testy mentions that there are many social

²²⁶ Kennedy, *supra* note 183, at 333-334.

²²⁷ Kent Greenfield, *Does Corporate Law Protect the Interests of Shareholders and Other Stakeholders? September 11th and the End of History of Corporate Law*, 76 TUL. L. REV. 1409, 1429 (2002).

²²⁸ KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE (2004) ; Katherine V.W. Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73 (1988).

²²⁹ Jeffrey N. Gordon, *Employee Stock Ownership in Economic Transitions: The Case of United Airlines* (Columbia Law School, Center for Law and Economic Studies, Working Paper No. 133, 1998).

²³⁰ Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL. L. REV. 899 (1993); Summers, *supra* note 77.

²³¹ Harry Arthurs, *Private Ordering and Workers’ Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation*, in LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES 471-487, *supra* note 85.

movements that seek to engage in progressive corporate law issues, but so far, there has been little crossover work between the movements. Therefore, it is vital that a dialogue begin and that coalitions be formed between progressive corporate law and social movements.²³²

The distance between the corporate field and other fields is diminishing. While in the past it was extremely rare to find progressive lawyers dealing with corporate law and corporate lawyers addressing public-interest issues, this is no longer the case. Corporate law is increasingly seen as a site of “liberation, not just oppression.”²³³ Moreover, critical legal scholars are increasingly becoming comfortable, even eager, to discuss economics and corporate structure.²³⁴ Hence, the cause lawyering movement in Israel cannot have found better timing to link itself with the progressive corporate law movement.

B. WHY NOT “CORPORATE SOCIAL RESPONSIBILITY?”

Caution is needed in forming the new alliance between cause lawyers and progressive corporate law in Israel. More specifically, it is easy to confuse progressive corporate law with the movement for *Corporate Social Responsibility* (CSR).²³⁵ Some have argued that they are the same,²³⁶ virtually existing as “Siamese twins.”²³⁷ The similarity between these two movements is clear: both seek to emphasize corporations’ role as public entities with a variety of social duties. However, these movements have shifted so far away from each other that we can no longer view them as being related to the same goals.

²³² Kellye Y. Testy, *Linking Progressive Corporate Law with Progressive Social Movements to Corporate Governance*, 76 TUL. L. REV. 1227, 1247-1251 (2002).

²³³ *Id.* at 1249.

²³⁴ *Id.*

²³⁵ For literature on this movement see Kent Greenfield, *Corporate Social Responsibility: There’s a Forest in those Trees: Teaching about the Role of Corporations in Society*, 34 GA. L. REV. 1011 (2000); ROBERT A. DAHL, *AFTER THE REVOLUTION? AUTHORITY IN A GOOD SOCIETY* (Rev. Ed. 1990); RALPH NADER, MARK J. GREEN AND JOEL SELIGMAN, *TAMING THE GIANT CORPORATION* (1976); CHRISTOPHER D. STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* (1975); David Vogel, *LOBBYING THE CORPORATION: A CITIZEN CHALLENGE TO BUSINESS AUTHORITY* (1978); David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1 (1979).

²³⁶ Testy, *supra* note 232.

²³⁷ PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1995).

At the outset, let us look at the definitions offered for the CSR movement. Davidsson defines it as “a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders *on a voluntary basis* (emphasis added).”²³⁸ Shamir defines it as “the social universe where ongoing negotiations over the very meaning and scope of the term social responsibility take place.”²³⁹ These definitions teach us that CSR is not only a voluntary concept, rather than mandatory, but also that it is a very amorphous concept which can “wear many hats” to suit various needs.

In fact, the CSR discourse has become “Business School” discourse, an essential part of the curriculum taught to MBA students. It has focused on what is best for profits, rather than what is good for society. Corporations have increasingly adopted “Corporate Responsibility” codes and initiatives programs, usually in the form of well-publicized charity events. They have turned CSR into a commodity, another product that corporations sell to increase profits.²⁴⁰ CSR has also provided unelected corporate executives with even greater power to replace democratic institutions and decide how to serve society.²⁴¹

These clear shortcomings can also be found in public-interest litigation based on CSR concepts. For example, Shamir examines the battle in the South African courts to force foreign pharmaceutical manufacturers to provide low-cost, generic AIDS medications.²⁴² In this case, cause lawyers represented AIDS activists, international and local NGOs and even the South African government against several MNCs. These lawyers tried to redefine CSR as a legal duty rather than a voluntary mechanism. Their goal was to force MNCs to take steps to ensure public health, the right to life and the medical well-being of citizens.

²³⁸ Pall A. Davidsson, *Legal Enforcement of Corporate Social Responsibility within the EU*, 8 COLUM. J. EUR. L. 529 (2002).

²³⁹ Ronen Shamir, *Corporate Responsibility and the South African Drug Wars: Outline of a New Frontier for Cause Lawyers*, in *THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE* 37-62 (Austin Sarat and Stuart Scheingold eds., 2005).

²⁴⁰ Testy, *supra* note 232; Shamir, *Id.* at 38.

²⁴¹ Testy, *Id.*

²⁴² Shamir, *supra* note 239.

According to Shamir, these lawyers managed to introduce a “new moral language” in the South African courts.²⁴³

However, Shamir’s work also exposes the weakness of CSR: first, even if it is utilized to the fullest, it might allow—at best—a change in the discourse, not the core corporate structure. It may affect the outcomes of those cases which reach the courts, and in which cause lawyers are present to voice this new discourse, but it would not change how corporations make decisions *ex ante*. Second, CSR litigation concentrates on the *voluntary vs. mandatory* nature of the concept. Therefore, it is external to the actual legal rules of corporations, which determine how corporations make decisions.

Winston’s work also demonstrates this weakness of CSR.²⁴⁴ He describes how NGOs have started to address corporations during the 1990s as a result of the transformation of power from the state to MNCs and international financial institutions. However, other factors have also played a role in NGOs’ decision to address corporate conduct: MNCs’ performance on labor and environment issues; the acknowledgment by NGOs that they had been too focused on political and civil rights as opposed to social and economic rights; and even the will of activists to recruit businessmen as human rights advocates.

Subsequently, Winston identifies two main strategies of NGOs toward corporations: *engaging* and *confronting*. The first tries to draw corporations into a dialogue to convince them by ethical arguments to adopt voluntary codes of conduct. The second believes that corporations will act only when their financial interests are threatened and, therefore, aims at initiating sanctions against them.²⁴⁵

Not surprisingly, corporations have chosen to respond only to those NGOs that preferred the former approach—i.e., dialogue to adopt voluntary codes. By relating only to such NGOs, MNCs have succeeded in denying the legitimacy of confronting groups, which has enabled MNCs to divide and control NGOs. NGOs “must now move the CSR agenda from voluntary compliance to ‘soft law’

²⁴³ *Id.*

²⁴⁴ Morton Winston, *NGO Strategies for Promoting Corporate Social Responsibility*, 16(1) ETHICS AND INTERNATIONAL AFFAIRS 71 (2002).

²⁴⁵ *Id.*

approaches,” Winston writes, “and finally to rigorous national and international enforcement regimes; but it is unlikely to be able to do so unless it can mobilize support for greater social accountability from informed consumers, concerned government officials, and progressive companies.”²⁴⁶

This recommendation captures the difficulty in promoting social change through CSR. The commodification of the concept and its de-radicalization have turned it into a slogan, rather than a concept of substance.²⁴⁷ Therefore, to facilitate real change, CSR is simply not enough; we must change the reality of corporate law itself.²⁴⁸

C. MAINSTREAM CORPORATE LAW

What is the reality of corporate law? Since the 19th century, corporations have affected the lives of billions—citizens, consumers, creditors and of course workers. What is the corporation? What is its “purpose”? Whom and what is it there to serve?

In his famous article, *Our Schizophrenic Conception of the Business Corporation*,²⁴⁹ Allen argues that two fundamental concepts exist simultaneously to answer these questions: the *Property Concept* and the *Social-entity Concept* of the corporation. These concepts often seem to be competing and clashing with one another, although Allen suggests that they are also completing and coexist with one another. The property concept emphasizes the private nature of the corporation, as the property of those who bought the control over it, whereas the

²⁴⁶ *Id.* at 87.

²⁴⁷ For literature criticizing CSR See DAVID VOGEL, *THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY* (2005); Ronen Shamir, *Mind the Gap: The Commodification of Corporate Social Responsibility*, 28(2) *SYMBOLIC INTERACTION* 229 (2005); Ronen Shamir, *Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility*, 38 *LAW & SOC’Y REV.* 635 (2004); Ronen Shamir, *The De-Radicalization of Corporate Social Responsibility*, 30(3) *CRITICAL SOCIOLOGY* 669 (2004); Davidsson, *supra* note 238.

²⁴⁸ Kent Greenfield, *New Principles for Corporate Law*, 1 *HASTINGS BUS. L.J.* 89, 116 (2005); Testy, *supra* note 232, at 92.

²⁴⁹ William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 *CARDOZO L. REV.* 261 (1992).

social entity concept emphasizes the public nature of the corporation as well as its role as a social actor affecting so many people in our world. However, for many years, one hegemonic answer has ruled the corporate law and policy discourse. Namely, the consensus among most corporate law scholars, as well as those in Israel,²⁵⁰ has been the *Shareholder Primacy Model* and the ethos of *Maximizing Shareholder-Value*. This is the mainstream corporate law.

According to mainstream corporate law, the firm is a “*Nexus of Contracts*,” the joint endeavor of various contractual actors that act together to produce goods and services. Therefore, the corporation is a legal fiction representing a set of contractual relationships between and among participants—i.e., employees, shareholders, creditors, and managers. Corporate law has two main purposes in this regard: first, to govern the contractual regime between corporate actors, that is, to serve as the “contracts law” of the corporation by setting the rules for explicit and implicit contractual bargains. In light of this purpose, mainstream corporate law is not mandatory, but is rather a series of default rules that can be either accepted or bargained around.

The second purpose of corporate law is to reduce agency costs. According to the classic analysis of Berle and Means from the 1930s,²⁵¹ the separation of ownership (shareholders) from control (managers and directors) in public corporations potentially creates situations in which managers might run the corporation incompetently or in their own self-interest rather than in the shareholders' best interests. Therefore, corporate law provides that the corporation is indeed run in the interests of its shareholders. What this means is

²⁵⁰ Eli Bukspan and Asa Kasher, *Ethics in Business Corporations: Legal and Moral Consideration*, 2 MISHPAT VE'ASAKIM (LAW AND BUSINESS) 159 (2005) (Hebrew); Eli Bukspan, *On the Purpose of the Business Corporation through the Glasses of Labor Law*, 11 LABOR, SOCIETY & LAW REV. 163 (2004) (Hebrew); Uriel Procatzia, *The Ownership of the Firm and its Limitations: Creditors, Employees, Widows and Orphans*, 22 HEBREW UNIV. L. REV. 301 (1993) (Hebrew).

²⁵¹ ADOLF A. BERLE, JR. AND GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

that to reduce agency costs, shareholder-wealth maximization becomes the ultimate purpose of the corporation, its board of directors and managers.²⁵²

As we can see, the supremacy of shareholders is inherent in mainstream corporate law. The theoretical basis for this supremacy is twofold:²⁵³ first, shareholders' property rights as the owners of the corporation. That is, a corporation is its shareholders' property which they can enjoy, just as a car is its owners' property and a house is its landlords' possession. Moreover, the Board of Directors owes fiduciary duties of care and loyalty to shareholders, who own the corporation and elect the directors to run it. The property concept also denies any responsibility of the corporation other than to its shareholders. Third parties, creditors, and workers—according to the property concept—all should organize their relations with the corporation by contractual means and other laws. For example, workers should use labor law and should not be given any place in corporate law itself.

The second justification for shareholder supremacy is a series of economic rationales: (1) reducing agency costs which derive from the problems of separating ownership from control, as we discussed above; (2) the difficulty shareholders face in gaining contractual protections as those given to other parties; (3) and shareholders' willingness and the ability to invest more than other stakeholders in their corporate supremacy. These economic rationales are all embodied in *the residual nature of the shareholders' claim*—being last in a long list of beneficiaries to gain profit.

Testy offers a classic example of how the *Shareholder Primacy Model* works: a decision over a plant closing. According to this example, corporate managers face the following dilemma: they could increase shareholder-value if an unproductive plant were closed; on the other hand, such a closing would displace workers and harm the community in which the corporation is situated. Under the *Shareholder Primacy Model*, Testy explains, managers must close the plant to

²⁵² Kellye Y. Testy, *Capitalism and Freedom—For Whom?: Feminist Legal Theory and Progressive Corporate Law*, 67 LAW & CONTEMP. PROBS. 87 (2004).

²⁵³ Greenfield, *supra* note 227.

fulfill their duty to shareholders, despite the harm to workers and other non-shareholder communities.²⁵⁴ This approach can be seen in the paradigm case of *Dodge v. Ford Motor Co.*²⁵⁵ In this case, the Dodge brothers—who were minority shareholders in the Ford Car Corporation—brought action against Henry Ford for his decision to allocate the company’s profit by providing employees with higher wages, rather than paying dividends to shareholders. The Michigan Supreme Court ruled in favor of the plaintiffs, deciding that—

[a] business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.

Another classic example is the British case of *Parke v. Daily News*,²⁵⁶ in which the holders of control in a newspaper corporation decided to close the company and to pay its surpluses to the employees. The minority shareholders brought action against this decision, and the House of Lords accepted their claim to invalidate the payment. The purpose of the corporation was, once again, declared as benefiting its shareholders and maximizing their profits.

The most famous work in recent years which reflects mainstream corporate law was introduced in 2001 by Hansmann and Kraakman in their famous article, *The End of History for Corporate Law*.²⁵⁷ In this essay, the authors warmly embrace the dominance of the *neoclassical* economic model of corporate governance. They argue that in the post-cold war global economy, in which Western capitalism is the worldwide consensus, the sole purpose of the corporation—both legally and normatively—is to maximize shareholder value. They write:

²⁵⁴ Testy, *supra* note 232, at 1231.

²⁵⁵ *Dodge v. Ford Motor Co.* 170 N.W. 668 (Mich. 1919).

²⁵⁶ *Parke v. Daily News* [1961] 1 All E.R. 695.

²⁵⁷ Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO L. J. 439 (2001).

[T]he basic law of corporate governance—indeed, most of corporate law—has achieved a high degree of uniformity across developed market jurisdictions, and continuing convergence toward a single, standard model is likely. The core legal features of the corporate form were already well established in advanced jurisdictions one hundred years ago, at the turn of the twentieth century. Although there remained considerable room for variation in governance practices and in the fine structure of corporate law throughout the twentieth century, the pressures for further convergence are now rapidly growing. Chief among these pressures is the recent dominance of a shareholder-centered ideology of corporate law among the business, government, and legal elites in key commercial jurisdictions. There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.²⁵⁸

Shortly after the article was published, Hansmann's and Kraakman's end-of-history argument, in the spirit of Fukuyama, encountered the reality of the Enron crisis. In fact, the Enron crisis and its consequences ensured that the debate over the premises of corporate law was never more lively and vigorous.²⁵⁹ The ground was, therefore, set for presenting counter-arguments to the substantive positions found in mainstream corporate law. Enter progressive corporate law.

D. PROGRESSIVE CORPORATE LAW AS AN ALTERNATIVE

1. The Critique

The *Shareholder Primacy Model* has been heavily criticized for both its practical consequences as well as for its theoretical misadventures. Corporations have been described as the new ruling power of the world, making undemocratic decisions which affect all of us. Corporate power has been identified as a source of a worldwide increase in social disparity, labor exploitation, environmental damage, corruption, and violence targeted at rivals, whoever they may be. Concern about the dangerous role of corporations has only increased due to

²⁵⁸ *Id.* at 439.

²⁵⁹ Greenfield, *supra* note 227; Testy, *supra* note 252, at 87-88.

recent economic globalization and the emergence of even more powerful companies in the form of MNCs.²⁶⁰ Most of these ills have been attributed to corporations' uncontrollable impulse to maximize profits.

A small group of progressive corporate law scholars—almost all of whom are American—have devoted considerable effort over the past decade to developing various counter-hegemonic approaches, challenging the model of *Shareholder-Value Maximization*. However, these scholars have not necessarily presented a joint vision of the future. Rather, they have shared deep concern over the existing structures of corporate governance, which they view as being undemocratic by nature.

Their observations can easily be applied to Israel, where—as we have seen in Chapter II—corporate activity has “created material well-being that allows so many people to live the eighteenth-century liberal ideal...of individual freedom, autonomy and choice. But...continuing massive layoffs treat workers at all levels as little more than disposable chattel, destroying their economic futures and personal satisfaction simply to increase stock price by a few points.”²⁶¹

Practices of corporate immorality have included increasing wealth disparities, deteriorating political and economic democracy due to enormous corporate power, and causing social actors such as workers to suffer externalities.²⁶² The shareholder preeminence has turned the corporation into what Mitchell calls “the perfect externalizing machine:”²⁶³ an immoral legal creature which, by its very nature, focuses solely on its shareholders' interests, while forcing other communities to pay the price.

The main problem with corporations, according to Mitchell, “is their drive to maximize short-term stock prices, a result that no thoughtful person really wants. The root of the problem is the corporate structure itself: the corporation's legal structure encourages managers to aim for exactly this short-term result, and it does so by constraining their freedom to act responsibly and morally: the result

²⁶⁰ DAVID C. KORTEN, *WHEN CORPORATIONS RULE THE WORLD* (1995); JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002).

²⁶¹ Mitchell, *supra* note 76, at 1-2.

²⁶² Testy, *supra* note 252, at 91-92.

²⁶³ Mitchell, *supra* note 76, at 49-65.

is immoral behavior.”²⁶⁴ As noted by Greenfield, this result is unavoidable, given the absolute dominance of shareholders:

[I]mposing a requirement that the firm's management look after the interests of the shareholders first and foremost, the law has created an entity that is virtually guaranteed to shed as many costs and risks onto others as it can... if a corporation can make money by paying its workers low wages or making them work in unsafe conditions, the rules of corporate governance make it more likely that the corporation will do so. By law and norm, the corporation cares about one thing, money.²⁶⁵

The theoretical foundations of shareholder preeminence have also been criticized. First, the *Property Rights Argument* has been challenged and is almost considered to be “old fashioned” in current corporate scholarship. The foundation for this change is the realistic approach to corporations, which often prevails in common law countries, such as the United States and Israel (side by side with the contractual approach we have mentioned) and views the corporation as a separate legal personality. Almost like a human being, the corporation is perceived as an independent entity, with its own rights and liabilities. However, this independent personality also “frees” the corporation from its shareholders’ ownership. In other words, if a person cannot be owned by another person, surely the corporate person cannot. At a different level, the contractual perception of the corporation—i.e., the famous “Nexus of Contracts”—turns shareholders into one group among many others who have contractual relations with the corporation, not necessarily ownership over it.²⁶⁶

The second theoretical critique of shareholder primacy concerns its economic rationale, particularly the agency costs component. In *The Place of Workers in Corporate Law*, Greenfield argues that while workers have almost no role in mainstream corporate law, the justifications given to shareholder dominance should apply equally to them.²⁶⁷ Among other factors, these include

²⁶⁴ Mitchell, *Id.* at 3.

²⁶⁵ Greenfield, *supra* note 227, at 1416.

²⁶⁶ Yedidia Z. Stern, *The Corporation as an Ownerless Legal Entity: Theory, Law, Reality*, 21 BAR ILAN UNIV. L. REV. 245, 323-326 (2004) (Hebrew).

²⁶⁷ Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283 (1998).

(1) agency costs reflecting the workers' lack of participation in decision-making; (2) workers' residual interest in the company as the group most incapable of "walking away;" (3) the tremendous effect which the corporation's financial situation has on workers; (4) workers' long-term, relational contracts with management, in which much is undecided *ex ante*; (5) workers' weak position in the employment contract, with very few substantive contractual protections, *de facto* allowing shareholders to externalize their costs onto workers.²⁶⁸

Therefore, progressive corporate law scholars generally reject the contractual view of mainstream corporate law and, alternatively, adopt a perception of the corporation as a quasi-public entity. They suggest that the long-term public interest, not the short-term shareholder value, should guide the governing rules of corporations.

Corporate law, according to this position, should not only serve as a neutral mediator in the corporate contractual bargaining process, but rather shape corporate conduct for society. Thus, progressive corporate law proposes that corporations should serve various stakeholders—ranging from workers, to creditors, to the community, and to society as a whole. Loyal to this role, corporations and their boards and managers are viewed by progressive scholars as trustees for the society, not for the shareholders.²⁶⁹ However, the nature of this role and its implementation are subject to a variety of interpretations, which we will now discuss.

2. Toward a New Corporation? Proposed Models

Several new models for corporate governance have been suggested in recent years to replace the *Shareholder Primacy Model*. Generally, these models have proposed "break[ing] the bonds that tie managers to stockholders."²⁷⁰ How can corporate law do that?

²⁶⁸ *Id.* at 326-327.

²⁶⁹ Testy, *supra* note 252, at 92.

²⁷⁰ Mitchell, *supra* note 76, at 185.

The “lightest” version of progressive corporate law is the *Corporate Accountability Model*. Campaigns adopting this model have placed transparency at the center. That is, they have called for more strict regulation on disclosure as a means of more consumer and public scrutiny over corporate conduct. This approach presumes that making corporations reveal more information about their conduct will allow consumers to attack corporations “where it hurts”—their pocket.

This model has naturally been described as inadequate because it does not substantially change the corporate balance of power. In fact, it leaves change to be pursued by the “free market,” failing to take the most famous market failure—gaps in information between various groups—into account.²⁷¹ Furthermore, in a world in which even well-informed individuals make a moral choice to overlook corporate ills which “do not concern them,” the ability of such a model to advance change seems limited.

A more progressive approach can be identified in the *Other-Constituency Model* (also known as the *Stakeholder Theory*). This model has suggested that corporate executives should take the interests of various groups, other than shareholders, into consideration. Historically, this model was born in the wave of firm takeovers during the 1980s, as managers used their commitment to various stakeholders as a reason to reject premium bids, and thereby, to remain in control of their enterprise as well as to keep their jobs. This commitment by managers later found its way into United States legislation, with over half of the states enacting laws which *permit* corporations (not *require* them) to consider the interests of non-shareholder groups when making decisions.²⁷²

The clear advantage of the *Other-Constituency Model* is that it suggests a more complex analysis of power relationships within the corporate structure, pointing to the often problematic consequences of shareholder primacy on other

²⁷¹ Testy, *supra* note 232, at 1235-1237.

²⁷² *Id.* at 1236-1238; Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14 (1992).

actors.²⁷³ Yet, in practice, the impact of other-constituency laws in the U.S. has so far been extremely small in changing the corporate orientation to shareholder interests. The historical roots of these other-constituency laws in the reality of the 1980s' takeovers did not really make them "social-entity" mechanisms.²⁷⁴ In addition, the permissive nature of these laws provides that the "powerful are likely to continue to prevail."²⁷⁵

The ambiguity of the term "other-constituencies" or even "stakeholders" also raises the question of whom we are actually talking about. This ambiguity increases the temptation of managers to continue to see the "good old" shareholders as their primary constituency. Of course, this temptation is even stronger because only shareholders—not "other constituencies"—elect the members of the board.²⁷⁶

Taking the *Stakeholder Theory* one step forward, non-shareholder models of the corporation were further developed. One of the most prominent of these models has been the *Team Production Model*, developed by Blair and Stout.²⁷⁷ This model views shareholders, managers, employees, creditors, and communities as a team. According to the model, all of these groups should not necessarily be represented on the board. Rather, a "mediating hierarchy", an "independent" board of directors, would allocate income more efficiently than other corporate institutions.

Blair and Stout further suggest that Board members should serve as trustees for all of the corporate groups. The very commitment toward these varied groups would reshape income distribution without any need for the law to interfere with the rules of the game. Even today, corporate law—as a positive matter—recognizes directors' duties to non-shareholder stakeholders.²⁷⁸

²⁷³ Testy, *Id.* at 1238.

²⁷⁴ Yedidia Z. Stern, *The Purpose of the Business Corporation—Interpretation and Practices*, 32 HEBREW UNIV. L. REV. 327, 336-337 (2002) (Hebrew).

²⁷⁵ Testy, *supra* note 232, at 1237.

²⁷⁶ *Id.*

²⁷⁷ Margaret M. Blair and Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999).

²⁷⁸ This, they argue, also serves the long-term interests of shareholders "because a shareholder decision to yield control rights over the firm to directors ex ante—that is, when the corporate

The obvious criticism of this model is similar to that of the *Other-Constituency Model*: the fact that it remains “neutral” on how income will actually be distributed is equal to preserving existing power relations. More specifically, “workers have much less ability than shareholders to exact bargaining concessions from other contracting parties or simply to walk away.”²⁷⁹ Shareholders who control most of the assets and enjoy political power are left with the power to bargain most effectively with the board. “When rights are allocated on the basis of what one can bargain and pay for,” Testy notes, “those with more resources will always come out ahead. And they will stay ahead, too.”²⁸⁰

Aiming at more radical ends, scholars have proposed *Labor-Oriented Models* of the corporation. Not surprisingly, these models have focused on giving workers a larger place in corporate management, undermining the very foundations of mainstream corporate governance.²⁸¹ For example, scholars have suggested that workers should have some role in electing directors,²⁸² that directors should be held to have fiduciary duties to workers,²⁸³ and that workers should have standing to bring suits for breach of fiduciary duty by managers who harm them.²⁸⁴

The German *Co-determination Model* is another illustration of a labor-oriented corporate structure. The German law requires that half of the supervising board of major companies consist of worker representatives. At the same time, workers take part in daily decision-making because the workplace is run by

coalition is first formed—can induce other participants in the team production process to make the kind of firm-specific investments necessary to reap a surplus from team production in the first place.” *Id.* at 305.

²⁷⁹ Greenfield, *supra* note 267, at 326-327.

²⁸⁰ Testy, *supra* note 232, at 1234.

²⁸¹ For Israeli literature on this model, see Guy Davidov, *Representation of Workers on Executive Boards: A Proposed Model*, in MENACHEM GOLDBERG BOOK 251-285 (Aharon Barak et al eds., 2001) (Hebrew).

²⁸² Greenfield, *supra* note 267, at 287.

²⁸³ *Id.*

²⁸⁴ Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579 (1992). In another place, Mitchell has also suggested changing the tax laws and the related accounting rules to capitalize workers’ salaries above a stipulated amount. According to this suggestion, all capitalized compensation would be carried as an asset on the balance sheet and depreciated over time. See Mitchell, *supra* note 76, at 246.

committees, similar to the British Model of joint labor-management *Work Councils*. The company is, therefore, seen as “a true partnership,”²⁸⁵ in which the interests of workers actually serve as a better business compass for the success of the firm.²⁸⁶

After exploring the prominent progressive corporate law models, we arrive at the most progressive model proposed so far. In 2005, Kent Greenfield published his article *New Principles for Corporate Law*,²⁸⁷ in which he presents five new principles. This article is probably the most novel and significant work today on the corporation as a conceptual tool for the redistribution of wealth. The model it presents can be applied to any common law system, whose corporate governance is based on shareholder primacy—such as in Israel. The following are its key features:

The first principle is that the ultimate purpose of the corporation should be to serve the interests of society as a whole. This means that a company cannot be considered a success if the total social value it creates is less than the social costs it externalizes onto others:²⁸⁸ “if a corporation sustains itself by extracting net wealth from society and transferring that wealth to its shareholders, managers or others, then it should be stopped...some companies **should** fail (emphasis in text).”²⁸⁹

The second principle is that corporations are distinctly able to contribute to the societal good by creating financial prosperity. Corporate law organizes the entity called corporations to serve society as engines of economic wealth

²⁸⁵ Greenfield, *supra* note 227, at 1423-1424.

²⁸⁶ *Id.* at 1427-1428. As expected, labor-oriented models of the corporation have been criticized by supporters of the *Shareholder Primacy Model*. For example, Hansmann and Kraakman have argued that these proposed models create “inefficient decisions, paralysis, or weak boards (Hansmann and Kraakman, *supra* note 257, at 445). The answer to this argument, as noted by Greenfield, is that it is self-evident and without citation or reference to any data. Furthermore, it is tautological: according to the argument’s logic, it is better to keep decision-making in the hands of shareholders because they will do a better job in... maximizing shareholder welfare! (Greenfield, *Id.* at 1425).

²⁸⁷ Greenfield, *supra* note 248.

²⁸⁸ *Id.* at 92.

²⁸⁹ *Id.* at 91-95.

creation.²⁹⁰ However, we must have progressive regulation to ensure that wealth creation indeed serves social causes. For example, corporate governance should make firms more attuned to social good or the firm's surplus to be shared more equitably.²⁹¹

The third principle is that corporate law should further Principles One and Two. In order to create institutions that create financial wealth for a range of stakeholders, the rules governing those institutions should align with the new purpose of the corporation.²⁹²

The fourth principle is that a corporation's wealth should be shared fairly among those who contribute to its creation. The collective nature of the firm should be recognized by equitable sharing of the corporate surplus. This surplus would be distributed among stakeholders in rough proportion to their contributions and investments in the company:

...as a society, we look not only at the total social wealth, but also at the equality of its distribution. Economic justice is ignored in mainstream corporate law...²⁹³ a stakeholder-oriented corporate law would work at the initial distribution of the corporate surplus and would benefit stakeholders up and down the economic hierarchy.²⁹⁴

The fifth principle argues that participatory, democratic corporate governance is the best way to ensure the sustainable creation and equitable distribution of corporate wealth. Corporate governance should focus on procedural fairness, developing appropriate mechanisms for group representation and democratization. This includes two institutions: first, stakeholders should be allowed to bring suits in court for violations of the duties of care and loyalty.

Second, and more importantly, a pluralist board should run the firm; stakeholders should elect their own representatives to serve as directors. This pluralist board would reflect the real negotiations among stakeholders about the

²⁹⁰ *Id.* at 97.

²⁹¹ *Id.* at 95-99.

²⁹² *Id.* at 100-108.

²⁹³ *Id.* at 112.

²⁹⁴ *Id.* at 114.

allocation of the corporate income.²⁹⁵ Greenfield argues that in some ways, the *Pluralist Board of Directors* is even more of a change than the German Co-determination model, because it not only grants representation to workers but radically turns boards into democratic institutions, comprised of various constituencies.

Naturally, it may be argued that such a progressive concept is “bad for business,” and hence, bad for workers who might suffer corporate losses. Some of this criticism was addressed as part of Greenfield’s first principle, arguing that corporations should exist only if they serve the societal good by creating wealth to be equitably shared. Furthermore, “healthy business and a healthy economy depend upon a rich understanding of the corporation’s role in modern society and its responsibilities as well as its rights.”²⁹⁶ Therefore, a pluralist corporation would be “bad for business” *only* if we understand business in the mainstream sense.

Greenfield identifies three main challenges from the mainstream which he addresses: first, the claim arguing that advancing shareholder wealth in itself advances societal wealth. Indeed, a company that is losing money is not much good to anyone. However, according to Greenfield, a firm that makes money for shareholders does not necessarily create wealth for others or for society. Therefore, mechanisms for profit-sharing must be established.²⁹⁷

Second, the “agency costs” claim, according to which broadening managers’ responsibilities “too much” releases them from any real responsibility. Greenfield calls this argument “the Emperor’s new clothes of corporate law scholarship:” on the one hand, mainstream scholars argue that stakeholders’ interests coincide with those of shareholders, and on the other hand, they threaten that “the sky will fall” once the interests of stakeholders are taken into account.

²⁹⁵ *Id.*, at 118.

²⁹⁶ Mitchell, *supra* note 76, at 7.

²⁹⁷ Greenfield, *supra* note 248, at 103-104.

Therefore, the agency costs of various stakeholders are just as important as those of shareholders.²⁹⁸

Third, Greenfield addresses the efficiency claim, which suggests that it is more efficient to govern the social role of corporations through non-corporate regulations, e.g. labor law. Greenfield replies that it would be more efficient to distribute the corporate surplus more fairly *ex ante*, using the corporate rules *themselves*. This argument returns to the notion that corporate law itself should serve as a mechanism “to move our society closer to what we want it to be.”²⁹⁹

Criticism should also be heard from the progressive wing of corporate law. In this context, there is a gap which needs to be addressed between Greenfield’s suggestion to redefine the purpose of the corporation (embodied in his first principle) and the concrete mechanisms he proposes to implement this purpose (embodied in his fifth principle). Namely, focusing on “procedural fairness” and allowing “negotiations” among various stakeholders, as Greenfield suggests, might not be enough. If we allow groups to negotiate without determining the rules for these negotiations, we are bound to face a slippery slope. The powerful are, once again, likely to prevail.

To better promote the new purpose of the corporations, mechanisms which go beyond procedure and negotiations should be developed. These mechanisms should ensure that workers are not only better represented in the corporation but also that they are, in fact, provided with a larger “slice of the pie.” As a preliminary suggestion, corporate governance should affirmatively construct *ex ante* rules of income distribution to guide the board in its decisions. For example, we should think about rules providing that a specific and considerable percentage of the annual profit is guaranteed to workers, that the allocation of unanticipated income would be conducted in accordance with these criteria, that differentiations between executive income and employee income cannot exceed a certain level,

²⁹⁸ *Id.* at 104-106.

²⁹⁹ *Id.* at 106-108.

and that a corporation would be allowed to engage in relocation, layoffs or outsourcing *only* if its workers' welfare is guaranteed.

Despite its shortcomings, Greenfield's new corporation model is without a doubt a real reason for optimism. It inspires a truly novel framework for economic and power redistribution, proving that corporate law and social change are not necessarily incompatible. In fact, those arguing for the abolition of the corporate entity as the "only radical solution" are misguided. They are wrong because the issue is not what we call our social institutions—corporations, cooperatives, or by any other name—the issue is what substance we endow those institutions with and how we shape them.

Progressive models demonstrate that corporations are not necessarily a synonym for "capitalism." Different political systems would most likely adopt similar institutions with almost identical features. Such institutions might work—and work well—to achieve the goal of social justice. Therefore, the debate is not about changing the names of our institutions. It is about reshaping them to serve new purposes.

We will now turn to Israeli law to locate vehicles by which to promote progressive notions of the corporation and the workers' place within it.

E. PROGRESSIVE MECHANISMS IN THE ISRAELI COMPANIES LAW (1999)

1. The Framework: Section 11(a) and the Purpose of the Corporation

The new Companies Law, which was enacted in Israel in 1999, provides progressive scholars and practitioners with fascinating opportunities for promoting workers' welfare. This Section has so far scarcely attracted any attention in legal practice or among the Israeli judiciary so far. The Supreme Court, for example, has neither addressed nor applied the Section in its important

decisions on corporate governance issues in recent years.³⁰⁰ Therefore, we would argue that Section 11(a) should gain recognition as a novel framework, which sheds a new and progressive light on Israeli corporate law. Let us begin by reading the text of the Section:

11. Purpose of company

a. The purpose of a company shall be to operate in accordance with business considerations in realizing its profits, and within the scope of such considerations, the interests of its creditors, its employees and the public; may inter alia be taken into account.³⁰¹

How progressively can we read this Section? Surprisingly, even mainstream corporate law scholars have recognized that it allows, or even requires, the company to take the interests of various stakeholders into account. Bukspan, for example, points to the fact that Section 11(a) portrays “social responsibility” notions of the corporation;³⁰² Goshen—taking a more conservative approach—argues that according to this Section, the company should consider its stakeholders interests *as long as they are consistent* with its purpose to maximize shareholder value,³⁰³ and Licht admits that Section 11(a) might “invite a significant equality-oriented interpretation...pointing to the fact that no traces of shareholder primacy are to be found in the text...”³⁰⁴

Section 11(a), therefore, emerges as a truly progressive legal creation. We should interpret it as an Israeli version of “other constituency” statutes, allowing

³⁰⁰ Eli Bukspan, *On the Links between Companies and Societies, and the Status of Section 11 of the Israeli Companies Law*, 1 MISHPAT VE’ASAKIM (LAW AND BUSINESS) 229 (2004) (Hebrew). More than 20 years ago, the Chief Justice of the Israeli Supreme Court at that time, Meir Shamgar, expressed his opinion that “the developing modern trend is that the company and its managers must not only take the interests of shareholders into account, but also the interests of the company’s employees, consumers and the general public.” See Further Hearing 7/1981 *Fnider v. Castro*, P.D. 37(4) 673, 695; C.A. 5320/1990 *Bernovich Assets and Renting v. Israel Securities Authority*, P.D. 46(2) 818, 839.

³⁰¹ For a comparison of the Israeli law to American other-constituency acts see Amir Licht, *The Purposes of the Corporation*, 1 MISHPAT VE’ASAKIM (LAW AND BUSINESS) 173, 193-196 (2004) (Hebrew).

³⁰² Bukspan, *supra* note 300, at 266-267.

³⁰³ Zohar Goshen, *A Critical Perspective on the New Companies Law: The Purpose of the Company, Purchase Offers and the Class Action*, 32(2) HEBREW UNIV. L. REV. 381 (2002) (Hebrew).

³⁰⁴ Licht, *supra* note 301, at 179.

managers to consider the interests of workers and other stakeholders as part of their decision-making process. The absence of shareholder preeminence in the text indicated, as Licht notes, that management has a duty to treat shareholders as but one of many groups, equal, for example, to employees.

This stakeholder approach to Section 11(a) is strengthened by a different interpretation given to the Section by Yedidia Stern, a leading corporate law scholar.³⁰⁵ In his article, *The Purpose of the Business Corporation—Interpretation and Practices*,³⁰⁶ Stern argues that Section 11(a) is no less than unique in the landscape of the Anglo-American legal system and that it should serve as a guideline for the reconstruction of the entire corporate law in Israel.³⁰⁷

Using the term “and within the scope of such considerations, the interests of...may inter alia be taken into account,” the legislature—according to Stern—explicitly decided to adopt a “third way,” a medial position between the *Shareholder Primacy Model* and the *Stakeholder Theory*.³⁰⁸ This position sees *the firm itself* as the entity managers should serve. Based on the realistic concept of the company’s separate legal personality, Stern argues that if the company is indeed an independent “live creature,” then it should maximize profits for its own sake—not for the sake of interested parties, such as shareholders or other stakeholders. Furthermore, it is only for the purpose of maximizing the firm’s “personal” profit that it might take the interests of these various groups into account.³⁰⁹ In so doing, the interests of all groups are considered to be equal.³¹⁰

Stern gives the example of dividend payments. These payments shift capital from the company to one particular group—the shareholders. Moreover, it

³⁰⁵ For Professor Stern’s work, see Yedidia Z. Stern, *The Corporation as an Ownerless Legal Entity: Theory, Law, Reality*, *supra* note 266; Yedidia Z. Stern, *The (Economic) Case against Identifying Corporate Goal with Shareholders Interests*, 1 MISHPAT VE’ASAKIM (LAW AND BUSINESS) 105 (2004) (Hebrew); Yedidia Z. Stern, *Shareholders Economy or Stakeholders Economy—Corporate Law from a Comparative and Global Perspective*, 9 HAMISHPAT 213 (2004) (Hebrew).

³⁰⁶ Stern, *supra* note 274.

³⁰⁷ Stern argues that the legislature’s decision to situate Section 11(a) in the central part of the statute, which deals with the establishment of the firm, represents not only the generality of the Section but also the considerable importance attributed to it by the legislature. *Id.* at 328, 340-341.

³⁰⁸ *Id.* at 354.

³⁰⁹ *Id.* at 344-345.

³¹⁰ *Id.* at 354.

decreases the body of assets from which the company will be able to pay its other stakeholders. If maximizing the firm's own value is our purpose, then any payment of dividends should theoretically be prohibited. However, prohibiting the payment of dividends altogether would harm the company's ability to raise capital in the future and might even damage the demand for its issued capital stock in the capital market. It might also harm various stakeholders, including employees who rely on the company's financial strength, in the long term.³¹¹

Therefore, according to Stern, the company should avoid dividend payments, whose sole purpose is to benefit shareholders, while simultaneously avoiding *not* paying such dividends, only because it seeks to protect other stakeholders. Consequently, the payment of dividends would be allowed, despite the fact that it transfers wealth outside of the company, if after weighing its cost-benefit outcomes, the company's benefit would increase its cost.³¹²

Stern's essay also strengthens the progressive reading of Section 11(a) with respect to its mandatory nature. It proposes two progressive interpretations of the allegedly permissive term "may...be taken into account:" first, the company must always consider the effects of its conduct on stakeholders, but it would make decisions according to those interests only when it contributes to the maximization of its "personal" profits.³¹³

Alternatively, the word "may" can be interpreted as being aimed not at the firm, but rather at the court, authorizing it to examine the conduct of the company while taking the company's consideration of various stakeholders into account in judicially reviewing its conduct.³¹⁴

Similar to Greenfield's *Pluralist Corporation Model*, the new corporation, according to Stern, might act as an institution which society authorizes and provides with various legal tools to create social wealth—not merely to benefit a

³¹¹ *Id.* at 346.

³¹² *Id.*

³¹³ *Id.* at 356. Naturally, this raises the question of enforcement and of the sanctions imposed on managers who violate this duty. Stern argues that the fact that Section 11(a) does not provide concrete tools for enforcement only emphasizes its general nature as a guideline for the entire law, a guideline with which managers must comply in the course of their daily performance. *Id.* at 341.

³¹⁴ *Id.* at 356-357. Some cause lawyers have expressed ideas supporting with this interpretation. See interview with D, Attorney, the ACRI, *supra* note 205.

small and powerful group of shareholders. However, the shortcomings of Stern's model are also quite clear: first, if we do not support the new corporate purpose with a new corporate structure, then shareholders are still likely to come ahead. This is especially true if the new purpose of the corporation is not to serve social causes, but rather to continue to create wealth for its "personal" use.

Second, redistribution is not on Stern's agenda. For example, he argues that the term "to operate in accordance with business considerations," which appears in Section 11(a), prohibits the company from paying its workers benefits exceeding those mentioned in the law.³¹⁵ As Stern notes, the Section's idea of taking the interests of stakeholders into account has no ideological meaning: it neither seeks to bind the company to the promotion of the welfare state, nor should we read it as the legislature's pretentiousness to advance distributive justice.³¹⁶

Therefore, what we should take from Stern's model are its important contribution to challenging the *Shareholder Primacy Model* in Israel as well as its notions regarding the non-permissive nature of Section 11(a). These contributions are crucial in establishing the Section as a progressive "other-constituency" law. Indeed, as we have discussed above, such laws are inherently limited in allowing income redistribution. Yet, this should not deter us from pursuing Section 11(a) as a platform for introducing progressive corporate law in Israel to be developed gradually. We will now explore additional mechanisms in the Companies Law which can be pursued progressively by implementing the new platform.

2. Section 6: Lifting the Corporate Veil

The first legal rule to which we will apply the progressive concept of Section 11(a) is Section 6 of the Companies Law, dealing with the lifting of the

³¹⁵ Stern, *Id.* at 350-351, *see* footnote 53.

³¹⁶ *Id.* at 378-379.

corporate veil (also known as *Veil Piercing*). What is the meaning of this mechanism?

As we know, the capitalist state encourages investors to incorporate, invest, initiate, engage in economic enterprises and even take calculated financial risks. It encourages them to do this by viewing the corporation as a separate legal personality, limiting shareholders' personal liability to the amount they have initially invested in the firm. This is the *Limited Liability* concept, which is considered to be a key feature in corporate economies.

Thus, corporate law separates shareholders and their private assets from the corporation and its capital. It provides that individual shareholders will not be held personally liable for the corporation's debts—even in bankruptcy—except for the amount representing their initial investment. In other words, as a general principle, individual shareholders would not bear the consequences of their company's financial situation, whatever this situation might be.

However, there is an exception. If the curtain separating shareholders from the corporation were used by shareholders to engage in illegal practices, this curtain could be removed. The court may lift the curtain to hold shareholders personally liable for their company's unlawful conduct. In Israeli law, Section 6 of the Companies Law, as enacted in 1999, determined:

6. Lifting the corporate veil...

(b) ...the court may lift the corporate veil if a condition relating thereto is prescribed under any enactment, or if it is just and right in the circumstances of the case to do so, or if the conditions prescribed in subsection (c) prevail:

(c) The court hearing a proceeding against a company may, in exceptional cases and for special reasons, lift the corporate veil if any one of the following conditions prevails:

(1) the use of the separate legal personality of the company is intended to frustrate the intent of any law or to defraud or discriminate against any person;

(2) in the circumstances of the case, it is just and right to do so, taking into account the fact that there was a reasonable basis for presuming that the management of the company's affairs was not in the company's best interest and that it involved the taking of an unreasonable risk in respect of the company's ability to pay its debts...

In interpreting this law, Israeli courts have focused on the circumstances for lifting the veil also known in American corporate law: noncompliance with corporate formalities,³¹⁷ substantial undercapitalization or commingling of assets,³¹⁸ Alter Ego,³¹⁹ and fraud. In addition, *Veil Piercing* was applied to labor-management relations. In one of the important cases rendered by the Labor Court, it ruled that—

[A]mong the variety of stakeholders in the firm, workers enjoy a unique status. They are not ordinary stakeholders. They do not act as business entities. On the contrary: workers treat the company as an employer. They see it as a safe and solid support for the long term. The special status of the worker as a stakeholder creates a unique level of corporate liability toward this worker, originated from the duty of good faith imposed on the company as part of its contractual relations with the worker. The worker is not another ‘voluntary’ creditor. She is a special stakeholder, toward which the company and its holders of control are increasingly liable.³²⁰

Labor courts have emphasized the inherent power gaps between labor and management as well as the economic dependence of workers on their corporate employers as a reason to impose a high level of liability on employers. “This liability,” the court concluded in the case of *Zilberstein v. “Erev Hadash”*,³²¹ “should not end at the corporate veil, but rather in the appropriate circumstances the court will protect the workers by lifting this veil to expose the true identity of the economic factor hiding behind it.”³²² Such protections were, indeed, rendered when a company did not provide a pension plan according to the collective

³¹⁷ This includes, for example, electing the Board of Directors, conducting annual meetings, financial records and detailed reports on transactions as required by law.

³¹⁸ The debt-to-equity ratio and the cash flow status of the corporation are key factors in establishing this cause.

³¹⁹ Under this doctrine, the corporate veil can be lifted when shareholders have used the corporate entity in a manner which leaves no distinction between the corporation and themselves. In other words, the lifting of the veil might take place when shareholders promote their individual, personal interests, over those of the corporation.

³²⁰ *Miriam Friedman v. Rachmiel Co.* 33(88) *Piskei Din Avodah* 34 (2000).

³²¹ *supra* note 146.

³²² *Id.* at 35.

bargaining agreement,³²³ and when a company employed a worker, knowing that it would not be financially able to pay her wages.³²⁴

In recent years, scholars have argued that the courts' implementation of the *Veil Piercing* doctrine was far-reaching, inserting "peculiar" observations which undermined the separation between shareholders and their firm.³²⁵ Not surprisingly, influential corporate shareholders have lobbied for a new law to narrow the applicability of Section 6 in Israeli courts. Consequently, the Knesset passed a comprehensive amendment to the Companies Law in early 2005.

This amendment brings about a new legal reality with respect to the *Veil Piercing* doctrine, cancelling some of the old Section's provisions. The amendment determines that the lifting of the corporate veil would occur only in those extraordinary cases involving the use of the company's separate legal personality (1) "to defraud a person or discriminate against a company's creditor;" (2) "in a manner which damages the purpose of the company and that it involved the taking of an unreasonable risk in respect of the company's ability to pay its debts."³²⁶

Comparing these features to the old version of Section 6, we can see that the legislature has considerably narrowed the ways in which courts can lift the corporate veil. For example, the legislature cancelled the former Article (b), which addressed the court's general ability to lift the veil *if it is just and right in the circumstances of the case to do so*. However, the new Section 6, while imposing new obstacles on *Veil Piercing*, also marks new possibilities. Progressive applications of the doctrine—using the appropriate tools—might even be strengthened.³²⁷

³²³ Adiv v. Merchavya Co. (National Labor Court, Unpublished, January 19, 2003).

³²⁴ District Labor Court – Haifa 3327/2003 *Sasa Sigal - Yishai Rami* (Unpublished, July 24, 2003); District Labor Court – Tel Aviv 914251/1999 *Namdar Michael – Pozanensky* (Unpublished, September 8, 2004); *Sabres Co. v. Ryad* 33(63) *Piskei Din Avodah* 38 (2002).

³²⁵ Stern, *supra* note 274, at 308.

³²⁶ The Companies Law (Amendment no. 3), 2005. An official English version has not yet been published, and the above provisions constitute the amendment's key features as chosen by the author.

³²⁷ In any event, Section 6 should further be pursued to hold shareholders individually liable for "daily" violation of workers' rights.

To examine this hypothesis, let us return to Section 11(a). As we have seen, this Section proposes a new and progressive interpretation of the corporation's purpose. The new Section 6 explicitly includes "the purpose of the company" in its provisions. Therefore, a progressive argument would be that actions contradicting the purpose of the company as described in Section 11(a)—i.e., to serve the interests of various stakeholders—such actions constitute a reason to lift the corporate veil. In other words, if the new Section 6 sees business conduct which is inconsistent with the purpose of the company as a reason to pierce the corporate veil, then such conduct must include maximizing shareholder value.³²⁸

Take, for example, the payment of dividends. If the purpose of the corporation is to serve the interests of its various stakeholders, then a payment of dividends solely aimed at maximizing shareholder-value is arguably a cause for lifting the corporate veil. This progressive interpretation might not only render workers with unprecedented remedies, cancelling unfair corporate decisions *ex post*, but it also might serve as a tool to affect decisions taken by corporations *ex ante*. That is, decision-makers fearing Veil Piercing decide on dividend allocation in a different way, potentially considering workers' interests to a much larger extent.

Moreover, consider layoffs, relocation or outsourcing. A company which is making considerable profits but decides to engage in mass layoffs, perform relocation or use outsourcing—the holders of control in such companies might be held personally liable for violating the legal purpose of the company.

Thus, applying Section 11(a) might not only neutralize substantial obstacles in the new Section 6, but even turn this amendment into a highly progressive means of social change.

3. Sections 192(a) and 193(a): Rights and Obligations of Shareholders

Section of 192(a) specifies:

³²⁸ Stern's analysis supports this argument. See *supra* note 274, at 359.

192. Shareholders' duties

(a) A shareholder shall act in exercising his rights and in fulfilling his duties towards the company and towards other shareholders with good faith and in a customary manner, and shall avoid exploiting his power in the company, inter alia, in voting at the general meeting or at class meetings, in the following matters: (1) alteration of the articles of association; (2) increase in the registered share capital; (3) merger; (4) approval of acts and transactions requiring the approval of the general meeting pursuant to the provisions of sections 255 and 268 to 275

Section 193(a) determines:

193. Duty of interested party and of decisive voting power to act fairly

(a) The duty to act fairly towards the company shall apply to the following: (1) a holder of control in the company; (2) a shareholder who knows that the manner in which he votes will be decisive in respect of a resolution of the general meeting or of a class meeting of the company; (3) a shareholder who, pursuant to the provisions of the articles of association, has the power to appoint or to prevent the appointment of an office holder in the company or any other power vis-a-vis the company.

Workers should use these rules to bring action against shareholders for violating their obligations to act in good faith, in a customary manner, and fairly. Once again, applying Section 11(a) to these rules would result in shareholders' liability for making decisions aimed solely at maximizing their own profits.³²⁹ Payment of dividends, layoffs, relocation, and outsourcing—all can be considered to be a breach of these obligations if they were intended to benefit shareholders at the expense of workers.

4. Sections 252-254: Duty of Care and Fiduciary Duty

As we have seen previously, progressive corporate law scholars suggest allowing workers standing to bring suits against managers for breach of fiduciary duties. This suggestion is indeed applicable to the following sections in Israeli law:

³²⁹ *Id.* at 363-365.

252. Duty of care

(a) An office holder owes a duty of care to the company as provided in sections 35 and 36 of the Civil Wrongs Ordinance [New Version]

(b) The provisions of subsection (a) shall not preclude a duty of care being owed by an office holder to another person.

253. Precautions and standard of proficiency

An office holder shall act with the standard of proficiency with which a reasonable office holder, in the same position and in the same circumstances, would act; this shall include taking reasonable steps, in view of the circumstances of the case, to obtain information regarding the business expedience of an act submitted for his approval or of an act done by him by virtue of his position, and to obtain all other pertinent information regarding such acts.

254. Fiduciary duty

(a) An office holder shall owe a fiduciary duty to the company, shall act in good faith and for the benefit of the company, including the following:

- (1) he shall refrain from any act involving a conflict of interest between the fulfillment of his role in the company and the fulfillment of any other role or his own personal affairs;
- (2) he shall refrain from any act involving competition with the business of the company;
- (3) he shall refrain from taking advantage of a business opportunity of the company with the aim of obtaining a benefit for himself or for any other person;
- (4) he shall disclose all information to the company and shall provide it with all documents relating to its interest that reach him by virtue of his position with the company.

Years before the enactment of the Companies Law in 1999, the Israeli Supreme Court decided that—

[the] applicability of the fiduciary duty is broad. It applies to every condition in which one has power and control over the other...the manager controls the firm. He runs its internal as well as external affairs. These require that together with power there will be liability; otherwise, we would face arbitrariness...the norms of

behavior—in the words of Justice Cardozo—are not those which exist in the marketplace and are not the result of struggle over power between equal parties. Therefore, the manager must not be found in a conflict of interests between the company’s interests and the interests of himself or others.³³⁰

Therefore, fiduciary duties receive a broad interpretation and impose substantial liabilities upon managers. These Sections can be used progressively by constructing both *ex ante* and *ex post* rules. The former means that given the purpose of the corporation in Section 11(a), managers are encouraged to make decisions that benefit workers as well as other non-shareholder constituencies. The law protects them from potential lawsuits filed by shareholders on the grounds of breach of duties.

The latter approach means that workers would be allowed to bring suits against managers for violation of duties if managers acted and made decisions based only on the interests of shareholders.³³¹

5. Sections 302-303: Distribution of Capital

Decisions on how to divide corporate capital touch on the “bare nerves” of corporations. In this regard, the Companies Law creates a mechanism in Section 303 which allows workers to play a role in these processes. To place this mechanism in context, one must first look at the rules of capital distribution as a set:

302. Permitted distribution

(a) A company may effect a distribution of its profits (hereinafter “the profit criterion”), provided that there is no reasonable suspicion that such distribution might deprive the company of its ability to pay its existing and anticipated debts when the time comes for so paying (hereinafter ‘the ability to pay criterion’).

...

303. Distribution with consent of court

³³⁰ C.A. 817/1979 *Koosoy v. Bank Y.L. Co.* P.D. 38(3) 253.

³³¹ Stern, *supra* note 274, at 361.

(a) The court may, on the application of a company, allow it to effect a distribution in respect of which the profit criterion is not fulfilled, provided that the court is convinced that there is no reasonable suspicion that such distribution might prevent the company from being able to pay its existing and anticipated debts when the time comes for such payment.

(b) A company shall notify its creditors of the submission of an application to the court as provided in subsection (a), in the manner prescribed by the Minister.

(c) A creditor may apply to the court and oppose the application of a company to permit it to effect a distribution.

(d) The court may, after having given the opposing creditors the opportunity to put their case, approve the company's application, in whole or in part, reject it or make the approval of it conditional.

As we can see, Section 303 allows the court to permit capital distribution which does not constitute the *profit criterion*, but merely the *ability to pay criterion*. Furthermore, the company's creditors—including workers—are given standing according to Section 303(c) to apply to the court opposing such payments.

In the case of “*Polgat*,” for example, the workers did, indeed, apply to the Tel Aviv District Court, opposing the \$34 million dividend declared by the company's new owners.³³² Indeed, the broad judgment given in this Section to courts, as well as the fact that the Supreme Court has not yet determined how and in which cases the courts should execute this judgment, leaves it wide open to litigation which uses this mechanism.

Workers should argue that given the far-reaching effects of capital distribution on their long-term welfare, their job security, and their share of corporate income, a strict interpretation of *the ability to pay* criterion should be adopted. That is, the burden to prove the ability to pay corporate debts should be placed on managers as a precondition to approving capital distribution; lifting this

³³² The Case was eventually settled. See Omer Sharvit, “*Polgat*” *Approved of its Distribution*, HAARETZ, March 29, 2005.

burden would require exceptional proof to prevent the reduction of the company's capital at the expense of workers.³³³

Naturally, if we apply the progressive interpretation of Section 11(a) to the issue of capital distribution, then it becomes even clearer that distributional decisions that favor shareholders would most likely be overturned by the court. It may empower workers to oppose the unfair distribution of income *ex post*, but it may also have a redistribution effect on decisions made by managers in the corporate market *ex ante*. Thus, Section 303 should be viewed as a crucial device in the legal shaping of capital distribution.

³³³ A strict requirement can be read in several decisions rendered so far in applications filed in courts according to Section 303(c). For example, *see* M.A. 10015/2005 *Beit Ami Co. v. Girsh Rosa* (Tel Aviv District Court, Unpublished, December 6, 2005).

CONCLUSION: RECOMMENDED STRATEGIES

The *Socioeconomic Approach* to law and public policy is one of the most prominent contributions to progressive legal movements in recent years. This approach analyzes the functioning of markets from a social welfare perspective, aimed at creating equitable economic growth.³³⁴ Progressive corporate law is a key feature in Law and Socioeconomics. It strives to create a new reality in which corporations serve as quasi-public entities to create economic wealth to be shared more equally.

In the Israeli case, public-interest legal organizations are in a unique position to lead the pursuit of progressive corporate law. Their wide experience in litigating human rights provides them with clear advantages in challenging traditional legal rules. Unlike unions, these groups are committed to promoting social change in the long-run rather than bargaining for better wages in the short-run. Therefore, public-interest organizations can no longer ignore their role as new actors in the labor market. They should not try to narrow their advocacy to cases involving only extreme violations of workers' rights. To better represent workers, these groups and their attorneys should change their focus from the state to corporations as being the most serious challenge to social justice and identify corporate governance as a framework within which to promote workers' welfare.

New criteria for case selection are required. Public-interest groups should represent workers in cases addressing not only the symptoms but rather the fundamental problem. That is, they should not concentrate on violations of the protective labor laws (e.g., the Minimum Wage Law) but instead focus on daily practices of inequitable distribution of capital. More specifically, they should litigate cases reflecting management's attempt to increase shareholder profit at the expense of labor, including unfair dividend payments, mass layoffs, plant relocation, and outsourcing.

The Israeli Companies Law (1999) ("The Law") includes several provisions which can be pursued progressively. The proposed legal framework

³³⁴ LYNN L. DALLAS, LAW AND PUBLIC POLICY: A SOCIOECONOMIC APPROACH (2005).

for cause lawyers to invoke is Section 11(a) of the Law. This Section specifies that the purpose of a company “shall be to operate in accordance with business considerations in realizing its profits, and within the scope of such considerations, the interests of its creditors, its employees and the public; may *inter alia* be taken into account.” Hence, the Section should be interpreted as an *Other-Constituency Law*, which requires corporate decision-makers to take the interests of stakeholders into account. It should not be read as a permissive arrangement, but rather as a mandatory requirement for managers to consider stakeholders’ interests, even if not making a final decision based exclusively on this criterion. It may also be interpreted as allowing courts to conduct judicial review by examining how the company considered the interests of stakeholders.

How should cause lawyers apply this framework? For example, they should use it to represent workers in cases involving *dividend payments* to shareholders in two instances: first, when the company finds itself in an unstable financial situation and the payment jeopardizes workers’ welfare in the long-term; second, when the payment unreasonably increases income inequality between shareholders and workers.

Section 303(c) of the Law should be applied in such cases. This Section requires corporations to apply for the court’s approval to pay dividends when their profits are not sufficiently high (i.e., when they do not meet the *profit criterion*). The Section allows stakeholders to bring action opposing this application. Therefore, cause lawyers should litigate cases opposing such corporate applications, arguing that dividends aimed solely at increasing shareholder income at the expense of stakeholders violate the legal purpose of the company according to Section 11(a).

Additional topics for litigation include mass layoffs, plant relocation, and outsourcing. Cause lawyers should challenge decisions to close factories, fire dozens of employees, shift their manufacturing across the boarder to lower labor costs, or hire contract workers for lower wages. Such decisions should be viewed as contradicting the purpose of the company, according to Section 11(a), if their goal is to increase shareholder profit. Hence, to obtain injunctions and court

orders revoking such decisions, cause lawyers should use the following provisions of the Law: Section 6, demanding the *lifting of the corporate veil* to hold executives personally liable for the company's conduct; Sections 192(a), 193(a), and 252-254, allowing stakeholders to file lawsuits against shareholders and managers for breach of *fiduciary duties*.

New strategies also call for public-interest groups to lobby in the Knesset for legislation. For example, Section 302 regarding "*Permitted Distribution*" should be amended to include new criteria for capital allocation. These criteria should determine a mandatory proportion of corporate income to be provided for workers. They should also establish a mandatory limitation on gaps in wages paid to executives and those paid to employees.

In addition, Section 303 should be amended in two ways: first, to specify that decisions on layoffs, relocation and outsourcing would be considered as distributional decisions which are not included in the "*Permitted Distribution*" route, but rather require a special court's approval; second, to adopt a more stringent definition of *the ability to pay* criterion (a test examining the company's financial ability to pay its debts to stakeholders after paying dividends). This is required to ensure that companies are not allowed to reduce capital unless workers' welfare is guaranteed.

Looking ahead, public-interest groups should also lobby for legislation introducing *Labor-Oriented Models* of the corporation. These models can provide workers with representation on boards and participation in decision-making. For example, cause lawyers should draft bills of legislation adopting of the *Co-determination Model*, such as that used in Germany and Scandinavia. The British model of *Work Councils*, in which managers and workers make joint decisions, could also serve as a guideline for new corporate legislation. In a later stage, new legislation should also introduce the *Pluralist Board of Directors*, in which various groups elect their representatives to the board, and the company acts to create social wealth to be equitably shared.

The goal of all of these mechanisms is not only to allow workers to file suits on corporate decisions *ex post*. Rather, the goal is to introduce legal

institutions which will affect corporate decision-making *ex ante*. In other words, the Law should be applied and developed by workers' cause lawyers to change how corporations are run to begin with. It should influence how decisions are made more equitably before or even without reaching the litigation stage.

To actually engage in these new strategies, public-interest groups should (1) provide professional training in corporate law for workers' cause lawyers; (2) develop their use of "*Amicus Curiae*" ("Friend of the Court") procedures to join cases conducted by third parties. Using this procedure would serve as an "easy landing" for cause lawyers who are taking their first steps in corporate litigation and it may also increase the workers' accessibility to legal services on issues currently litigated primarily by private practitioners; (3) open the organizations' doors to workers seeking representation on issues of income inequality by prioritizing such topics among the many requests they receive; (4) establish channels of cooperation with the Histadrut (the largest trade union in Israel) to increase workers' access to legal representation on these issues, especially for workers in peripheral areas in Israel; and (5) conduct public campaigns, primarily through the media, to emphasize the importance of corporate conduct toward workers.

Finally, this paper calls for further research to examine the effectiveness of progressive corporate law institutions as new *labor market institutions*, replacing traditional labor law in national as well as in global contexts. The Socioeconomic approach should, therefore, be applied to study the functioning of such new institutions in transformative labor markets and to assess how they can contribute to equitable development. In addition, future research might signal the emergence of new frontiers for cause lawyers to promote workers' welfare both nationally and globally.

Indeed, progressive corporate law offers new horizons for progressive lawyers to challenge the social-economic status quo. This paper has only begun to scratch the surface.

APPENDIX A - METHODOLOGY

This paper utilized a case study of three prominent public-interest legal organizations: the Association for Civil Rights in Israel (ACRI), the “Worker’s Hotline,” and the Forum for Enforcement of Workers’ Rights (“The Forum”). These are currently the leading groups in Israel engaged in workers’ advocacy; they have lobbied and litigated the lion’s share of cases dealing with such issues. The paper analyzed 24 of these groups’ high-profile cases from the mid-1990s, which have raised fundamental questions regarding labor policy.

Furthermore, 10 semi-structured interviews were conducted in Israel with prominent cause lawyers and decision-makers on legal policy within public-interest groups: five lawyers from the ACRI, one of whom also serves as the Executive Director of the organization (interviewees A-E); two lawyers and the Manager of the “Worker’s Hotline” (interviewees F-H); and two lawyers who worked for the ACRI and currently work at the Legal Clinics of the Tel Aviv University (interviewees I-J). Four of these interviewees are also among the lawyers and decision-makers of the Forum, which does not have its own staff, but rather acts as a coalition of several groups.

For information on corporate activity and its effects on workers, the paper analyzed data from three main sources: first, reports issued by governmental institutions, such as the Central Bureau of Statistics, the Israel Bank, the National Insurance Bureau, and the Ministry of Industry, Trade and Employment; second, reports by NGOs research institutes such as the “Adva” Center for Information on Equality and Social Justice in Israel, the Business Data Israel Group (BDI), the Israel Democracy Institute, and the Employment and Welfare Clinic of The Hebrew University Faculty of Law; third, academic literature.

For the developments in cause lawyering, the dilemmas public-interest groups are encountering, and institutions of progressive corporate law, the study conducted a literature review of both American and Israeli scholarship.

APPENDIX B - INTERVIEW PROTOCOL

INTRODUCTION

This project examines how organizations, such as your own, represent corporate workers and how they might use corporate law in this regard. I am interested in your perspective on this topic and in learning about your experience in lobbying and litigating for workers' rights. I am also interested in the dilemmas you may have encountered as well as your thoughts about the future in the field.

A. CURRENT STRATEGIES

- 1) What key problems concerning workers' rights did you address in the cases you were involved in through lobbying or litigation?
- 2) How did you address these problems in the cases? For example, how did you decide which cases to take? What arguments did you make and why?
- 3) What dilemmas and obstacles, if any, did you encounter in your work on those cases?
- 4) Did you take part in internal debates which took place in your organization regarding its policy on workers' rights cases? If so, what can you tell me about these debates? For example, what was the topic? What positions were expressed? How was the debate resolved?
- 5) How do you evaluate the effectiveness of current strategies pursued by your organization in promoting workers' rights?

B. PURSUING A NEW FRONTIER

- 6) Do you believe your organization should develop its engagement with issues of corporate responsibility toward workers? If so, how do you think your organization should do so?

7) What difficulties do you foresee, if any, in adopting a labor-corporate agenda rather than a human rights agenda? How do you suggest addressing these difficulties?

8) What difficulties do you foresee, if any, in representing workers who are not affiliated members of the organization (unlike the situation in unions)? How do you suggest addressing these difficulties?

9) What difficulties do you foresee, if any, in litigating with corporations while at the same time receiving funding from private donors and foundations? For example, do you see a problem of donor interference with policy issues? How do you suggest addressing these difficulties?

10) Do you think your organization should challenge the concept according to which corporations should always maximize shareholder-value?

11) Do you see any use of corporate law to promote workers' rights? If so, how? Can you identify any barriers in using corporate law for this purpose?

CONCLUSION

Do you have any general comments to make? Do you have anything else to add?

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