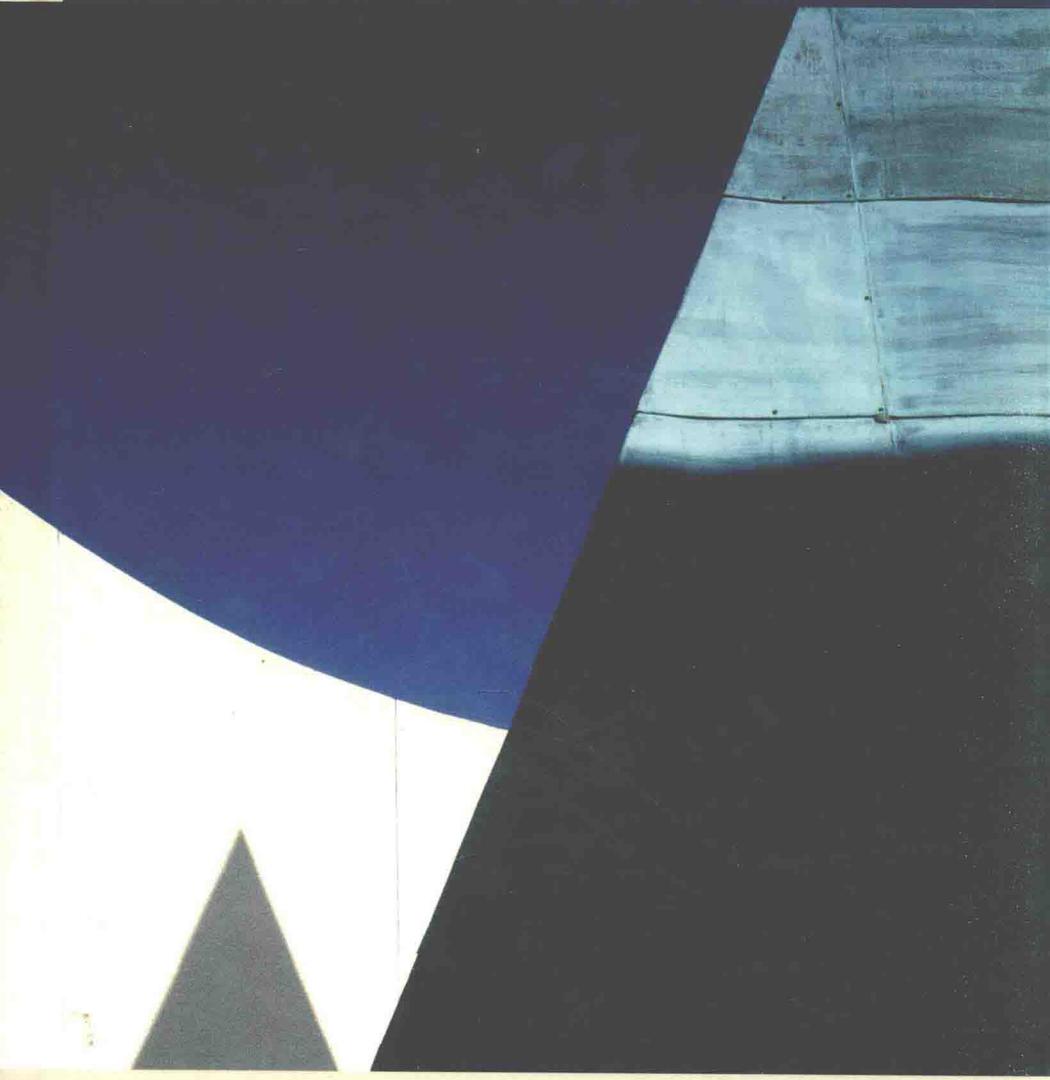
CAMBRIDGE STUDIES IN CONSTITUTIONAL LAW



Yoav Dotan

LAWYERING FOR THE RULE OF LAW

GOVERNMENT LAWYERS AND THE RISE OF JUDICIAL POWER IN ISRAEL

CAMBRIDGE

LAWYERING FOR THE RULE OF LAW

Government Lawyers and the Rise of Judicial Power in Israel

YOAV DOTAN

CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

Published in the United States of America by Cambridge University Press, New York

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781107625907

First published 2014

Printed in the United Kingdom by CPI Group Ltd, Croydon CR0 4YY

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication data
Dotan, Yoav.
Lawyering for the rule of law : government lawyers and the rise of judicial power in Israel / Yoav Dotan.
pages cm. (Cambridge studies in constitutional law; 9)
ISBN 978-1-107-03899-8 (hardback) ISBN 978-1-107-62590-7 (paperback)
1. Political questions and judicial power–Israel. 2. Government attorneys–Israel. I. Title.
KMK2244.D68 2013
347.5694–dc23
2013023923

ISBN 978-1-107-03899-8 Hardback
ISBN 978-1-107-62590-7 Paperback

ACKNOWLEDGMENTS

This book is a product of many years of research in the archives of the Israeli Supreme Court and the Ministry of Justice. Throughout the years and the various stages of the project I have benefited from the dedicated help of my research assistants whom are too numerous to be indicated by names. I am also thankful to the Ministry of Justice for allowing me access to their files and to the many lawyers and judges who agreed to be interviewed for this project. During the stage of writing the text I have benefited immensely from the assistance of Moshe Ostrovsky and Shira Gartenberg. I am also deeply indebted to Gali Aviv Weisman for her invaluable assistance as a statistical advisor and to Diana Rubanenko for her dedicated assistance as language editor.

FIGURES

TABLES

CONTENTS

Introduction: The government's lawyer

Why study government lawyers? The main theme of this book is that government lawyers play a predominant role in both public law litigation and administrative policy-making. Studying the work of government lawyers is therefore essential for the study of litigation as a technique aimed at bringing about social reforms. I also argue that the study of government lawyers enables us to re-evaluate many concepts related to the study of the legal profession at large.

Lawyers in the public sector form a significant portion of the legal profession.[1] Lawyers are involved in every aspect of government work. They have a major impact on legislation, policy-making, implementation, and enforcement. Even more significant is the involvement of government lawyers in litigation. Government lawyers appear on a regular basis before all courts of law, and in many jurisdictions they form the group of lawyers who most frequently take part in high court litigation.[2] Government lawyers and their agency clients have also been shown – by research conducted in various countries – to be the most successful litigants in most

[1] For data on the relative number of government lawyers in the United States see the US Department of Labor Statistics at www.bls.gov/oes/current/oes231011.htm#nat; for Great Britain see "Trends in the Solicitors' Profession" (Annual Statistical Report 2011 prepared by Nina Fletcher Research Unit for the Law Society 2011); for Quebeq see "Lawyers in Private Practice in 2021" (Report of the Committee on Current Issues in Private Practice and the Future of the Profession, Barreau du Quebec, 2011, at 57).

[2] For example, the Solicitor General is by far the most frequent litigant before the United States Supreme Court: see R. M. Salokar, *The Solicitor General: The Politics of Law* (Philadelphia, PA: Temple University Press, 1992), 3; D. M. Provine, *Case Selection in the United States Supreme Court* (University of Chicago Press, 1980), 89. The same situation is reported with regard to the United States Court of Appeal, District of Columbia Circuit, see P. M. Wald, "'For the United States': Government Lawyers in Court," 36 *L. & Contemp. Probs.* 107, 107–108 (1998) and note 2. By the term "government lawyers" I refer to lawyers employed by the central government as opposed to lawyers who work for local authorities or independent agencies. Since the main focus of this book is on lawyers representing the government in public law litigation, I will often use the term "government lawyers" to refer to this specific group.

judicial forums, including in litigation in the high courts.[3] Accordingly, government lawyers play a major role in shaping public policy through litigation.

Despite their substantial size as a group within the legal profession and their prominent role in high court litigation, until recently academic literature has tended to neglect public sector lawyering in general and government lawyering in particular. The literature on the legal profession focuses on private sector lawyering as the prominent (if not the ultimate) model of lawyers' practice.[4] The literature on public law litigation tends, on the other hand, to view "the government" as a single-unit entity that

[3] The question of what constitutes "success" in litigation is complicated and is discussed in more detail in Chapter 3. At this stage, by "success" I refer to the immediate outcomes of the litigation (i.e. to the question of whether a petition or appeal was allowed or dismissed etc.). From this perspective there is a general consensus that governments are ultimately the most successful litigants in high court litigation. This is the case for virtually all studies that examined the outcomes of litigation in various countries and judicial forums. See for the United States Supreme Court: Provine, *Case Selection*, above note 2; Salokar, *The Solicitor General*, above note 2, at 23–31; R. S. Sheehan, W. Mishler and D. S. Songer, "Ideology, Status and Differential Success of Direct Parties Before the Supreme Court," 86 *Am. Pol. Sci. Rev.* 464 (1992). For the United States Courts of Appeals, see D. R. Songer and R. S. Sheehan, "Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals," 36 *Am. J. Pol. Sci.* 235 (1992). For states' supreme courts, see S. Wheeler, B. Cartwright, R. A. Kagan and L. M. Friedman, "Do the 'Haves' Come Out Ahead: Winning and Losing in State Supreme Courts, 1870–1970," 21 *Law & Soc'y Rev.* 403 (1987). For the House of Lords in the UK, see B. M. Atkins, "Alternative Model of Appeal Mobilization in Judicial Hierarchies," 37 *Am. J. Pol. Sci.* 780 (1993). For the Supreme Court of Canada see P. McCormick, "Party Capability Theory and Appellate Success in the Supreme Court of Canada 1949–1992," 26 *Can. J. Pol. Sci.* 523, 526 (1993). For South Africa see S. L. Haynie and J. Devore, "Judging in an Unjust Regime: South Africa's Appellate Division, 1950–1990," 17 *Am. Rev. Pol.* 245–263 (1996). For the Supreme Court of the Philippines, see S. L. Haynie, "Resource Inequalities and Litigation Outcomes in the Philippine Supreme Court," 56 *J. Pol.* 752 (1994). The case of Israel is no exception in this respect, see T. Eisenberg, T. Fisher and I. Rosen-Zvi, "Israel's Supreme Court Appellate Jurisdiction: An Empirical Study," 96 *Cornell L. Rev.* 693, 717–799 (2011) (reporting that the government is far more successful than other litigants both in civil and criminal appeals before the Supreme Court). See also the discussion in Chapter 3. For a comprehensive study on the overall influence of the Solicitor General in the United States on all aspects of the Supreme Court's decision-making see R. C. Black and R. J. Owens, *The Solicitor General and the United States Supreme Court* (Cambridge University Press, 2012).

[4] See e.g. R. L. Abel and P. S. C. Lewis (eds.), *Lawyers in Society: An Overview* (Berkeley: University of California Press, 1995); R. L. Abel and P. S. C. Lewis (eds.), *Lawyers in Society: The Common Law World* (Berkeley: University of California Press, 1988); S. M. Linowitz and M. Mayer, *The Betrayed Profession: Lawyering at the End of the Twentieth Century* (Maryland: Johns Hopkins University Press, 1994); A. T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, MA: Belknap Press of Harvard University Press, 1993); M. Davis and F. A. Elliston (eds.), *Ethics and the Legal Profession* (New York: Prometheus Books, 1986).

forms a unanimous party in litigation. It often disregards the fact that the government's "representative" in court is – in itself – an important player participating in the litigation, while its positions and interests do not fully correspond with those of its client agency.

It is the purpose of this book to focus on the unique function of government lawyers in high court litigation. Recently the amount of academic research performed on legal institutions within government is increasing, and much research has been conducted on major institutions such as the attorney general and the solicitor general of the United States.[5] It seems, however, that what is missing from this literature is a comprehensive discussion of the relationships between government lawyering, judicial review,[6] and policy-making in democracies.

The group I focus on in this book is a relatively small group of elite lawyers who serve in one department within the Office of the Attorney General (OAG) in Israel. This group of lawyers is in charge of representing almost all government agencies before the Supreme Court of Israel on

[5] See e.g. D. L. Horowitz, *The Jurocracy: Government Lawyers, Agency Programs and Judicial Decisions* (Washington, D.C.: Lexington Books, 1977); J. Einstein, *Counsel for the United States: U.S. Attorney General in the Political and Legal System* (Maryland: Johns Hopkins University Press, 1978); L. Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law* (New York: Knopf, 1987); C. W. Clayton, *The Politics of Justice: The Attorney General and the Making of Legal Policy* (New York: M. E. Sharpe, 1992); Salokar, *The Solicitor General*, above note 2; R. L. Pacelle, *Between Law and Politics: The Solicitor General and the Structuring of Race, Gender and Reproductive Rights Litigation* (Texas: A&M University Press, 2003); N. V. Baker, *Conflicting Loyalties: Law and Politics in the Attorney General's Office 1789–1990* (University Press of Kansas, 1992); C. W. Clayton (ed.), *Government Lawyers: The Federal Legal Bureaucracy and Presidential Policies* (University Press of Kansas, 1995). For a discussion of the status of the Attorney General in the UK, see J. Ll. J. Edwards, *The Attorney General and the Public Interest* (London: Sweet and Maxwell, 1984). See also articles in N. Devins (ed.), Government Lawyering 61(1–2) *Law & Contemp. Probs.* 1 (1998); Symposium: Legal Ethics for Government Lawyers, 9(2) *Widener J. Pub. L.* 199 (2000). For a discussion of Government Lawyers in Canada see J. B. Kelly, "Bureaucratic Activism and the Charter of Rights and Freedoms: The Department of Justice and Its Entry into the Centre of Government," 42 *Can. Pub. Admin.* 476 (1999); J. B. Kelly, "Canada: Legal Services and the Role of Government Lawyers" (Paper presented at the Annual Meeting of the Law and Society Association, Budapest, July 4–7, 2001, copy with the author).

[6] The term "judicial review" carries different meanings in different legal systems. In the United States the term often refers to the *constitutional* review of statutes, while in the United Kingdom the meaning of this term is much broader and includes also review of *administrative* decisions by the courts (see e.g. S. A. De Smith, H. Woolf, J. L. Jowell and A.P. Le Sueur, *Judicial Review of Administrative Action*, 5th edn., vol. I (Sweet & Maxwell, 1995)). Throughout this book I use the term judicial review in its broad meaning to include all activities by courts to supervise acts and decisions made by both the legislature and administrative agencies.

public law matters (and, in this respect the function of this department is largely equivalent to the office of the Solicitor General in the United States). As I shall demonstrate they perform a wide range of unique functions related to the process of judicial review. The study of this group of lawyers provides insights into the unique position of government lawyers within the legal profession, and, at the same time, is the key to understanding the process of judicial review.

A. Government lawyers and lawyering

Any discussion of the ethical, social, and moral dilemmas of the legal profession needs to deal with the conflicting commitments of lawyers. Lawyers are often described as "double agents," since at the heart of law practice lies the conflict between their commitment to their clients, and their commitment to (at least some basic) general values of the system within which they operate.[7] Therefore, any lawyering (i.e. even in the private sector) is inherently embedded in the clash between the lawyer's commitment to the party they represent in litigation and their duty as "an officer of the court."[8] The dilemmas entailed in public lawyering are, however, different and far more complex. The government lawyer's commitment to their "client" agency is – in many cases – much less visible and

[7] See e.g. Kronman, above note 4, Chapter 1 (discussing the "Lawyer-Statesman" model); L. Fuller and J. D. Randall, "Professional Responsibility: Report of the Joint Conference," 44 *Am. Bar Ass'n. J.* 1159, 1161 (1958); A. S. Blumberg,"The Practice of Law as Confidence Game," in V. Aubert (ed.), *Sociology of Law* (1969) 321, 328; R. Gordon, "The Ideal and the Actual in the Law: Fantasies and Practices of New York City Lawyers, 1870–1910," in G. W. Gawalt (ed.), *The New High Priests: Lawyers in Post-Civil War America* (1984) 51; D. C. Langevoort and R. K. Rasmussen, "Skewing the Results: The Role of Lawyers in Transmitting Legal Rules," 5 *S. Cal. Interdisc. L.J.* 375, 414 (1997); E. E. Ugarte, "The Government Lawyer and the Common Good," 40 *S. Tex. L. Rev.* 269, 275 (1999).

[8] See e.g. D. Mellinkoff, *The Conscience of a Lawyer* (St. Paul, MN: West Publishing Company, 1973); M. H. Freedman, *Lawyers' Ethics in an Adversary System* (New York: The Bobbs-Merrill Company Inc., 1975); B. A. Babcock, "Defending the Guilty," 32 *Clev. St. L. Rev.* 175 (1983); C. Fried, "The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation," 85 *Yale L.J.* 1060 (1976); D. Luban, "The Adversary System Excuse," in D. Luban (ed.) *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* (Totowa, NJ: Rowman & Allenheld, 1983) 83; W. H. Simon, "The Ideology of Advocacy: Procedural Justice and Professional Ethics," *Wis. L. Rev.* 29 (1978); G. J. Postema, "Moral Responsibility in Professional Ethics," 55 *N.Y.U. L. Rev.* 63 (1980); M. E. Frankel, "The Search for Truth: An Umpireal View," 123 *U. Pa. L. Rev.* 1031 (1975); R. Wasserstrom, "Lawyers as Professionals: Some Moral Issues," 5 *Hum. Rts.* 1 (1975); M. H. Rubin, "The Ethical Negotiator: Ethical Dilemmas, Unhappy Clients, and Angry Third Parties," 26 *Constr. Law.* 12, 24 (2006); K. P. Lewinbuk, "Let's Sue All the Lawyers: The Rise of Claims Against Lawyers for Aiding and Abetting a Client's Breach of Fiduciary Duty," 40 *Ariz. St. L.J.* 135, 137 (2008).

intensive than in the case of a private client. In some circumstances – such as in the case of criminal prosecutors – the lawyer has no tangible client except the abstract entity of the general public.[9] The dilemmas between commitment to the client and duty to the public interest at large exist, however, even outside the criminal realm, even when the government lawyer does have a concrete client, such as an administrative agency in judicial review.[10]

Questions such as to whom exactly do government lawyers owe a duty of fidelity, and which values should guide their professional activities receive conflicting answers both in official pronouncements and in the literature. One proposal is the "Single Client Model" in which government attorneys owe their duties to their direct supervisors and should serve their client's interests at the same level of zealousness as any other lawyer.[11] At the other end of the spectrum, the "Public Interest Model" holds that the true client of government attorneys is the general public and therefore government lawyers should direct their actions toward the broad public interest, rather than for the benefit of an individual member of government.[12]

One manifestation of the conflict between the duty to the specific client agency and the commitment to the public interest at large is evident in the relationships between government attorneys and the courts before which they appear as litigators. The government lawyer's commitment to the court and to the public interest (as manifested through the judicial process) is presumed to be much stronger than in the case of private attorneys. Under the doctrine of separation of powers, the judiciary and the executive in modern democracies are regarded as wholly independent of

[9] See e.g. N. D. Polikoff, "Am I My Client?: The Role Confusion of a Lawyer Activist," 31 *Harv. C.R.-C.L. L. Rev.* 443 (1996).

[10] See e.g. S. K. Berenson, "Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?," 41 *B. C. L. Rev.* 789 (2000); Note, "Government Counsel and their Obligations," 121 *Harv. L. Rev.* 1409 (2008).

[11] See G. P. Miller, "Government Lawyers' Ethics in a System of Checks and Balances," 54 *U. Chi. L. Rev.* 1293 (1987), and see also note – Harvard, above note 10, at 1413.

[12] See B. A. Green, "Must Government Lawyers 'Seek Justice' in Civil Litigation?" 9 *Widener J. Pub. L.* 235, 235–237 (2000); Berenson, above note 10; S. K. Berenson, "The Duty Defined: Specific Obligations that Follow from Civil Government Lawyers' General Duty to Serve the Public Interest," 42 *Brandeis L.J.* 13 (2003). See also P. J. Utz, "Two Models of Prosecutorial Professionalism," in W. F. McDonald (ed.), *The Prosecutor* (Beverly Hills, CA: Sage, 1979) 99 (distinguishing between "adversarial" and "magisterial" ideology of prosecutors and suggesting that the latter model is characterized by emphasis on broad commitment by the prosecutor to the general public interest rather than on narrow ambition to maximize the rate of convictions).

each other. This independence is, however, much confuted by the reality of the close relationship between government lawyers and judges. Some aspects of their close ties are institutional and professional, while others can be explained on social and ideological grounds.[13] Government lawyers appear before certain judicial forums more frequently than any other group of lawyers, and the court system's ability to operate effectively often depends on the capacity of those two groups of professionals to cooperate. Judges often depend – to a large extent – on cooperation from the government in order to assure strict compliance with their decisions, particularly in complicated or sensitive issues. The careers of judges and government lawyers are often closely intertwined, since both types of position are regarded as "public sector" legal careers.[14]

For some, this reality may appear as an inevitable or even benign aspect of an effective legal system.[15] Others may argue that close cooperation between government attorneys and judges is not only alien to the fundamental values of the adversarial legal system, but also violates the principle of separation of powers (if not reminiscent of non-democratic regimes, such as the former Eastern European systems).[16] The question whether this phenomenon of close ties between government lawyers and judges is benign or harmful will be one of the main questions discussed in this book.[17] It is hardly doubted, however, that this sense of "common public service enterprise" for both government lawyers and judges exists in many legal systems, including those traditional common-law systems that are often characterized as adversarial by nature.[18]

On top of these conflicting commitments, government lawyering raises some additional questions of an ethical, moral, and legal nature. One question touches upon the relationship between the lawyer's commitment toward their client, and their own personal ideological convictions.

[13] Thus, for example, Lincoln Caplan described in detail the social affinity of various Solicitor Generals and Supreme Court justices in the United States (See Caplan, above note 5, at 20) while Pamela Utz discussed the institutional conditions that explain the evolvement of the "magisterial" ideology of prosecutors in Alameda County (see Utz, above note 12, at 115–118).

[14] See Wald, *For the United States*, above note 2, at 109. A good illustration of the intensity of these relationships is Lincoln Caplan's characterization of the Solicitor General in the United States as "The Tenth Justice." See Caplan, above note, and see also D. A. Strauss, "The Solicitor General and the Interests of the United States," 61 *Law & Contemp. Probs.* 165 (1998).

[15] See Wald, *ibid.* [16] See e.g. Miller, above note 11, at 1297. [17] See Chapter 4.

[18] See Wald, above note 2, at 109; and above note 10. See also Y. Dotan, "Judicial Rhetoric, Government Lawyers, and Human Rights: The Case of the Israeli High Court of Justice During the *Intifada*," 33 *Law & Soc'y Rev.* 319 (1999).

Traditional theory of the legal profession regards lawyers as value-neutral professional agents hired by their clients to foster the latter's interests. This model of lawyers as "hired guns" has recently been challenged by growing academic interest in the phenomenon of "political" or "cause" lawyering. Lawyers who answer to this vision of the profession consider their legal activity as a vehicle to promote certain moral or social objectives. Therefore they choose cases, clients, and careers according to what they stand for, rather than what fosters the immediate private interest of their client.[19]

One strand of the growing literature on political lawyers focuses on lawyers who operate in the non-governmental public sector, i.e. lawyers who work for voluntary organizations (NGOs).[20] While the parameters that distinguish cause lawyering from other sorts of legal practice are by no means fully clear or agreed upon among scholars,[21] one may wonder whether and to what extent ideological preferences influence lawyers' practices and decisions within the sphere of the governmental public sector. Research on government lawyers has pointed out some interesting similarities shared by government lawyers and lawyers working for NGOs. Much like classic cause lawyers, government lawyers sometimes feel committed to certain values of the organizations to which they belong (for example, a bureau that is in charge of enforcing environmental standards in a given field). The career patterns of NGO lawyers and government lawyers may also be closely intertwined, even though those lawyers often meet each other on different sides of the litigation battlefield.[22] The same can sometimes be said about the social affiliations of these two groups of lawyers. While these facts should not disguise the fundamental differences between lawyers who serve government and lawyers operating in the non-governmental public sector, they do justify an effort to examine government lawyers within the context of political lawyering.

[19] A. Sarat and S. Scheingold, "Cause Lawyering and the Reproduction of Professional Authority: An Introduction," in A. Sarat and S. Scheingold (eds.), *Cause Lawyering: Political Commitments and Professional Responsibilities* (New York: Oxford University Press, 1998) 3.

[20] See *ibid.*, and the other articles appearing in this volume.

[21] See Sarat and Scheingold, above note 19, at 5–8; Y. Dotan, "Public Lawyers and Private Clients: An Empirical Observation on the Relative Success Rates of Cause Lawyers," 21 *Law & Pol'y* 401 (1999).

[22] See Y. Dotan, "Cause Lawyers Crossing the Lines: Patterns of Fragmentation and Cooperation between State and Civil Rights Lawyers in Israel," 5 *Int'l J. Legal Prof.* 193 (1998).

Last, but not least, there is one additional factor that distinguishes government lawyers from their private counterparts. Government lawyers are not only lawyers, they are also – in most cases – *government officials.*[23] They work for the government as employees under a specific legal regime that bestows on them special powers and duties. Their commitment toward their clients may well stand in conflict with their duties as public officials under the constitution and the statutes of the relevant legal system. Additionally, and more than for any other public official, this commitment toward legal values may contradict their duty to obey the instructions of their superiors within the hierarchic structure of the bureaucracy.

Thus, more than other lawyers, government lawyers are subject to a complex array of conflicting commitments. This quadrangle of conflicting commitments toward the court before which they appear, their client agency, their personal moral convictions, and their duties as public officials will be the heart of the discussion in this book. Throughout this book I discuss the tensions between these conflicting commitments by focusing on one group of lawyers who represent the Israeli government before the Israeli Supreme Court. The model of lawyering in which those lawyers engage is by no means representative of all, or even most, government lawyers (in general, and in Israel as well). Rather, this kind of lawyering takes to the extreme some aspects of government lawyering on account of others. Nevertheless, a discussion of these law practitioners allows us, I believe, to learn much about the complexities of government lawyering and the relative advantages and disadvantages of the possible choices that government lawyers confront.

B. Government lawyers, litigation and social change

The study of government lawyers is important not only from the perspective of studying the legal profession. It is also essential for understanding litigation as a technique for social reform. Across the world we are witnessing a constant increase in courts' involvement in all aspects of public life. The phenomenon of judicial activism has long ceased to be viewed as uniquely American. Litigation is rapidly becoming a predominant technique used by individuals, organizations, and politicians in order to influence political processes and initiate social reforms.[24] While the literature

[23] See Horowitz, above note 5, at 1; Green, above note 12, at 245.

[24] See e.g. C. N. Tate and T. Valinder (eds.), *The Global Expansion of Judicial Power* (New York University Press, 1995); L. Epstein and J. F. Kobylka, *The Supreme Court and Legal*

dealing with judicial activism is abundant, it focuses almost exclusively either on the work of the courts themselves or – to a much lesser degree – on the work of organizations (governmental or non-governmental) who take part in public law litigation. The role of government lawyers in the process of public law litigation, as well as in the process of initiating and implementing social reforms through litigation, is much neglected.

One of the main purposes of this book is to demonstrate the important role of government lawyers in the process of public law litigation. Government lawyers play a central role in the process of the litigation itself. In many cases the outcome of the litigation depends on government lawyers, no less than on the judges who sit on the bench. Sometimes, their influence may even exceed that of the judges since in many cases the government lawyer has considerable latitude. They can settle the case before any judicial decision is made; they can bring their client to adopt a position that would render the litigation redundant. They are also able to adopt a given position in the litigation that will shape the framework of the anticipated litigation. Thus, the government lawyer is often able to influence the range of possible outcomes, well before the court even reads the file.

Apart from their paramount function in the litigation itself, government lawyers have an even greater role *in the process that follows the litigation*. It is hardly a secret that the courts' ability to initiate social reform is highly compromised by an array of institutional constraints. The literature discussing the social impact of judicial decision-making strongly suggests that courts *alone* can seldom bring about social change.[25] Courts normally need *cooperation* from other players within the governmental

Change: Abortion and the Death Penalty (Chapel Hill, NC: North Carolina University Press, 1992); R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004). Judicial "Activism" is not a simple concept and there are various meanings for this term. I will discuss this in Chapter 1 Section C, p. 31.

[25] For the discussion of the institutional limitations of courts see e.g. D. L. Horowitz, *The Courts and Social Policy* (Washington, D.C.: Brookings Institution Press, 1977); R. A. L. Gambitta, M. L. May and J. C. Foster (eds.), *Governing Through Courts* (Beverly Hills, CA: Sage, 1981). For studies discussing courts' ability to bring about social change, see e.g. S. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (New Haven, CT: Yale University Press, 1974); G. N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 2nd edn. (University of Chicago Press, 2008); M. W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (University of Chicago Press, 1994); M. M. Feeley and E. L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (Cambridge University Press, 1998).

sector in order to successfully transform their declarations into an actual process of social change. Courts are also well aware of this fact. Government lawyers are the most immediate candidates to supply the court with this necessary aid in transforming the court decision into an administrative process of reform. Without their cooperation, social reform through litigation is unlikely– or even completely impossible. Courts often *expect* the legal bureaucracy of the government to serve as *their* "agents" to ensure compliance and implementation.

While initially litigation could have been regarded as merely a channel through which external pressures are exerted on governments, in the world of judicial activism it has become a predominant framework for policy-making in itself. There is hardly a policy-making process in present-day democracy that disregards the question of whether the proposed decision or practice would withstand judicial review. Moreover, in many cases the policy-making process begins as a result of litigation, or is being conducted while litigation is pending and under the supervision of the judicial forum.[26]

Activist courts today have the ambition (or at least the willingness) to be involved in policy-making, despite the fact that they suffer from serious institutional limitations in this regard. Courts are passive institutions that have relatively little control of their agenda. Adjudication is a highly formal and inflexible decision-making process. Policy-making by courts is piecemeal and incremental. Courts have no means for systematically collecting data, evaluating the broad effects of a given decision (such as the price of implementing a certain court order), assessing priorities, and so forth. Courts also lack the ability to monitor over time a process that follows certain decisions and thus cannot evaluate its correctness.[27] The question is, then, how – if at all – courts can remain effective political actors despite these institutional constraints. Throughout this book, I will argue that courts in Israel have managed to overcome many of these boundaries by creating ancillary mechanisms that allow them to function

[26] See e.g. Feeley and Rubin, *ibid.*, and Chapter 5.

[27] See Horowitz, above note 25; D. J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon Press, 1986); R. A. Kagan, "Adversarial Legalism and American Government," 10 *J. Pol'y Analysis & Mgmt.* 369 (1991); R. Baldwin and C. McCrudden, *Regulation and Public Law* (London: Weidenfeld and Nicolson, 1987); J. F. Handler, *Down from Bureaucracy: The Ambiguity of Privatization and Empowerment* (New Jersey: Princeton University Press, 1996); M. Shapiro, *Who Guards the Guardians?: Judicial Control of Administration* (Athens, GA: University of Georgia Press, 1988); R. J. Pierce, "Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking," *Duke L.J.* 300 (1988).