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. 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. Government lawyers and their agency clients have also been shown – by research conducted in various countries – to be the most successful litigants in most


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 Appeals, 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.
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judicial forums, including in litigation in the high courts. 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. The literature on public law litigation tends, on the other hand, to view “the government” as a single-unit entity that

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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. It seems, however, that what is missing from this literature is a comprehensive discussion of the relationships between government lawyering, judicial review, 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

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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.
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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. 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.” 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


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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. 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.

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 zealously as any other lawyer. 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.

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

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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).


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

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.  

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). While the parameters that distinguish cause lawyering from other sorts of legal practice are by no means fully clear or agreed upon among scholars, 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. 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.

20 See ibid., and the other articles appearing in this volume.
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. 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. While the literature

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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. 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.

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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.