

Berkeley Law
Berkeley Law Scholarship Repository

Faculty Scholarship

4-28-2015

An Introduction to *Lawyering for the Rule of Law*

Malcolm M. Feeley
Berkeley Law

Follow this and additional works at: <https://scholarship.law.berkeley.edu/facpubs>



Part of the [Law Commons](#)

Recommended Citation

An Introduction to *Lawyering for the Rule of Law*, 11 *Jrslm. Rev. Legal Stud.* 1 (2015)

This Article is brought to you for free and open access by Berkeley Law Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

An Introduction to *Lawyering for the Rule of Law*

Malcolm M. Feeley*

Introductory note

One of the highlights of the annual meeting of the Law and Society Association, held in Minneapolis, Minnesota in May 2014, was the Reader meets Author session of Yoav Dotan's important book, *Lawyering for the Rule of Law: Government Lawyers and the Rise of Judicial Power in Israel*.¹ The room was overflowing with scholars from several countries, interested in the legal profession, public administration, constitutional law, judicial activism, judicial administration, and administrative law. They were not disappointed. A panel of distinguished scholars from several disciplines in the social sciences and law offered important observations on the book. Their presentations were stunning, and the give and take in the freewheeling question and answer period that followed was exciting. The essays that follow cannot convey the excitement of the question and comment period, but together they reveal the richness of Dotan's book, and the wide range of reactions that it has engendered. The brief discussion below identifies the main themes of the book, and outlines its main arguments. It is designed to orient the reader to more substantive comments that follow from the several reviewers of the book.

Yoav Dotan begins his book, by reminding us of the inherent tension in the practice of law. All lawyers, he asserts, confront a quandary: they owe fidelity to the rule of the law on the one hand, and owe unswerving loyalty to their clients on the other (p. 4). With government lawyers, he goes on to remind us, the tension is further complicated. Their client, the state, is a "they" rather than an "it," and at times government lawyers, as is the case with prosecutors, have no "tangible" clients at all. So the question: "to whom exactly do government lawyers owe a duty...?" It is a challenge.

Dotan's book focuses on one particular institution and one particular period in which these questions were heightened. The institution is the High Court of

*Malcolm M. Feeley, Jurisprudence and Social Policy Program, Boalt Hall School of Law, University of California at Berkeley. Email: mfeeley@law.berkeley.edu

¹ YOAV DOTAN, *LAWYERING FOR THE RULE OF LAW: GOVERNMENT LAWYERS AND THE RISE OF JUDICIAL POWER IN ISRAEL* (2014).

Justice Department (HCJD) within the Office of the Attorney General, the unit that has responsibility for representing the government in virtually every significant case arising before the Supreme Court when it sits as the High Court of Justice (HCJ). The period is the period of the ascendancy of “hyper-activism” (his term) of this court, a period when it dramatically expanded its role by institutionalizing judicial review in a state with a tradition of parliamentary sovereignty, created constitutional rights out of thin air or from ordinary legislation, and then breathed expansive meaning into them. The HCJ is a distinctive type of court, a legacy of the Mandate. In Palestine as elsewhere in the Empire, British colonial officials preferred a policy of indirect rule, allowing natives to handle their own affairs as much as possible, including legal issues in their private affairs, but intervening when natives brought claims against the government. Ordinary cases were tried in lower courts, but complaints against the government were reserved for the HCJ staffed by colonial officials. Typically, this court was the colonial supreme court sitting as a trial court. The benefits were obvious; the ruling regime allowed local native courts to handle matters of little political significance and centralized and oversaw administrative law issues. In the British postcolony, some new countries, including Israel, maintained this policy, allowing their supreme courts to act like trial courts in claims against the government. It rationalized the administrative process. Rationalization was further extended by creating a central department—in Israel, the HCJD—to represent the government in all these cases. That is, the government both centralized court proceedings, and centralized legal representation. On the surface, this looks as if the executive could easily maintain tight control over both the court and the lawyers representing it in that single court. But in Israel, the reverse emerged. An independent court was able to gain control over the legal department that represented the government before it.

Dotan’s study explores the development of this arrangement. It recounts fascinating institutional developments: the rise of an attorney general’s office that, unlike its American counterpart, remained at arm’s length from the government; the rise of a powerful and independent supreme court; and the rise of a set of government lawyers whose institutional loyalty was to “the rule of law” and the court which shaped that law. If the Attorney General in the American governmental process is understood to be the “President’s lawyer,” (think Bobby Kennedy to President John Kennedy), the Israeli Attorney General and his entire office have by consensus come to be understood as apolitical and distanced from the direct influence of the government. What holds for the Office of the Attorney General, is especially true for the unit within it, the HCJD, which defends the government in claims against it.

One can immediately appreciate the role morality this causes for lawyers in the Department. Simultaneously, they have a duty to represent the government and a duty to represent the rule of law as they anticipate what the HCJ

would want. Dotan's book provides an account of the exacerbation of this tension with the rise of judicial activism, and then the resolution of the tension as one view came to prevail in the HCJD. Since its establishment, the Office of the Attorney General has been able to recruit the best and the brightest lawyers to work on its staff, law graduates of Hebrew University and later Tel Aviv University. These young people graduated with top honors, clerked on the Supreme Court, served in prestigious government positions, and ended up in the Office of the Attorney General. The best of this group ended up in the HCJD. Many of these lawyers were subsequently appointed to the judiciary, including the Supreme Court. Thus, two developments took place simultaneously; the Office of the Attorney General gained a high degree of autonomy due to its high prestige (autonomy that was also buttressed by the Supreme Court's rulings later on), and as some of its lawyers moved on to the Supreme Court, a close bond was cemented between the Office of the Attorney General (and especially the HCJD) and the Supreme Court. In so doing, the Office of the Attorney General was able to distance itself from the Prime Minister and the government which it ostensibly serves. As Dotan points out, Israel's parliamentary system not only blends executive and legislative functions, its autonomous attorney general's office blends its executive and judicial functions, not by politicizing the judiciary, as is the case in so many countries, but by judicializing a portion of the executive office.

This connection served to dissipate the natural role tension that one would expect of government lawyers. Indeed, this deep and enduring connection served to advance the hyper-activist agenda of the Supreme Court. Dotan explores in great detail how the bond between the HCJD and the HCJ was cemented in the 1980s, just as the Court embarked on its sustained activist agenda that was embraced with enthusiasm for 20 years, and is now somewhat in remission. This development of activism was not without tension and controversy, but it eventually resulted in the consolidation of the link between the HCJ and the HCJD. This transformation was the result of sustained and careful effort on the part of several powerful attorneys general, other lawyers in the Office of the Attorney General, and powerful Supreme Court justices (and at times crucially, justices who had earlier occupied the position of Attorney General, as is the case with Aharon Barak and Yitzhak Zamir). The result was a powerful court able to expand its reach with the assistance of a powerful and trusted set of lawyers in the HCJD.

In his informative Chapters Two and Three, Dotan examines the caseload of the HCJ and in so doing shows just how many of its cases raise important issues of public policy. Since around 1980 the High Court has dramatically expanded standing, allowing virtually anyone to raise any question about government practices, and decided matters that before might have been resolved exclusively by the Knesset or the government. Among them are religious issues of all sorts that pit secular against religious citizens and institutions,

Arab-Israeli claims against the state, municipal–central government issues, governance issues in the Territories, and the status and treatment of prisoners and security detainees. In addition it has seized opportunities to declare constitutional rights, and interpret them expansively. Among other things, this plethora of expanded responsibilities dramatically increased the Court’s case load during the 1980s and 1990s. And it was in this regard that the HCJD came to serve an important function for the Court, primarily by facilitating out-of-court settlements.

In the core of the book, Chapters Five and Six, Dotan traces the change in the HCJD from an office of talented lawyers who represented the government into what he characterizes as an adjunct of the Court. Its long-held independence and insistence that its primary fidelity is “to the rule of law,” was deepened and institutionalized. The lawyers in the HCJD came to see their role as anticipating the views of the Court—which they understood as the “rule of law”—and not the interests of their clients. In the process, it was essentially transformed from an executive legal department into a judicial adjunct. This transformation was not without problems—long-time staff attorneys resisted and were forced out or retired—but in short order the HCJD came to understand itself and be understood by others to owe its fidelity to the rule of law as expressed by or likely to be expressed by the Court. However, the shift was not as dramatic as I suggest; in vast numbers of cases, probably the overwhelming majority, there is no tension or likely to be any significant differences between what the Court, its judicial adjunct (the HCJD), and government agencies want. Still, on a recurring basis in cases involving significant matters of public policy, there are marked differences between the Court and the government, and in those cases the government lawyers side with the Court.

Dotan describes lawyers in the HCJD doing things that in the United States federal district courts would be undertaken by federal magistrates whose office was created to assist judges in reviewing cases, permanent court clerks, or clerks to individual judges, weeding out frivolous cases, overseeing and encouraging settlements, highlighting big cases, overseeing the preparation of the record in big and important cases, and the like. In some cases, HCJD lawyers serve the functions that, in the United States, court-appointed special masters or monitors serve—to act as the eyes and ears of the court, to speak off the record but nevertheless authoritatively, and to help craft institutional design in behalf of the Court. As the HCJ delved ever deeper into more and more complicated areas of social and legal life, the effort required to keep on top of issues mounted, and the role of HCJD as an important “ancillary institution” expanded accordingly (p.172).

In effect, Dotan’s study traces the bureaucratization of the Israeli judiciary. As the Court took on policy making and other missions, it began to look like an administrative agency or an executive office: it acquired a staff. The strength and power of Dotan’s book is that it is a clear and straightforward account of

this development. As if to sum up the lessons learned, Dotan reserves the latter half of Chapter Five and most of Chapter Six to provide vivid accounts of how the lawyers in the HCJD serve the Court as an ancillary institution. In Chapter Five, he asserts the “special role of the HCJD with regard to policy-making processes is largely the result of the role that the court itself plays within the over-all picture of Israeli administration” (p. 171). The title of Chapter Six vividly describes the role of HCJD lawyers in a great many cases: “*The government lawyer as adjudicator: ‘pre-petitions’ and the HCJD.*” HCJD lawyers are closely enough integrated into the judiciary that they can, in effect, speak for the Court, broker settlements in behalf of the Court, assign court costs, and the like. This informative chapter concludes with the observation: “... the lawyers in the department served not only as supervisors of their client agencies but also as arbitrators that disposed of ‘controversies’ between the petitioners (mostly represented by organizations or other repeat players)” and their own clients” (p. 187).

Dotan also notes that this practice began to decline in the mid-1990s, which leaves open the question of just how permanent this change will be. One view might be that it is now deeply institutionalized due to the functional requisites of the press of a heavy and hefty caseload. Another might be that it was the consequence of the will of a powerful set of players, whose edifice will collapse once they pass from the scene. As the Court retreats from hyper-activism, as some argue that it seems to have been doing in recent years, what effect will this have on the relationship between the HCJ and the HCJD? Still, evidence from around the world suggests an increase in the growth of Judge & Co., as courts expand their functions in the modern administrative state, and as they take on more and more of the characteristics of the very bureaucracies they are charged with overseeing.

These are just some of the issues that are addressed by the authors of the several reviews that follow. Taken together, they offer an important collective portrait and assessment of this useful and indeed pathbreaking book.