

2009

## The Lawyer's Role in a Contemporary Democracy, Tensions Between Various Conceptions of the Lawyer's Role, Regulation of Israeli Lawyers: From Professional Autonomy to Multi-Institutional Regulation

Neta Ziv

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

---

### Recommended Citation

Neta Ziv, *The Lawyer's Role in a Contemporary Democracy, Tensions Between Various Conceptions of the Lawyer's Role, Regulation of Israeli Lawyers: From Professional Autonomy to Multi-Institutional Regulation*, 77 Fordham L. Rev. 1763 (2009).

Available at: <https://ir.lawnet.fordham.edu/flr/vol77/iss4/21>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

---

# The Lawyer's Role in a Contemporary Democracy, Tensions Between Various Conceptions of the Lawyer's Role, Regulation of Israeli Lawyers: From Professional Autonomy to Multi-Institutional Regulation

## Cover Page Footnote

\* Tel Aviv University Faculty of Law. I wish to thank the participants in the Symposium and, in particular, Fred Zacharias for providing essential resources for this essay. \*\* The Fordham Law Review relies on the author's translations for all Hebrew-language sources.

# REGULATION OF ISRAELI LAWYERS: FROM PROFESSIONAL AUTONOMY TO MULTI- INSTITUTIONAL REGULATION

*Neta Ziv\**

## INTRODUCTION\*\*

Since the 1950s, research on the social organization of lawyers has attracted legal scholars and social scientists interested in jurisprudence and the justice system. Law is no longer considered only a system of state commands or a technical mechanism to resolve disputes, but also a body of knowledge shaped by experts and professionals and a site of power for controlling the production of such knowledge. Thus, questions about the groups that comprise the legal profession have become an integral part of research about law and the legal system. Lawyers, a dominant group within the legal profession (alongside judges and the legal academia), are part of "law making." As Philip S. C. Lewis contends, "[lawyers] stand between the formal legal system and those who are subject to or take advantage of it."<sup>1</sup> They are necessary agents for people who wish to enjoy the protection of law. They draw legal materials that constitute the basis of legal arguments and reasoning. They formulate contracts, take part in drafting legislation, manage negotiations, and are necessary agents within adjudication.<sup>2</sup>

This Symposium inquires into the relationship between lawyers and democracy. The richness of its essays attests to the variety of paradigms in which one could examine this question. As Fred Zacharias describes in the opening remarks to his essay in this volume, one could ask whether lawyers *can* promote the values of democracy, given frequent inconsistencies

---

\* Tel Aviv University Faculty of Law. I wish to thank the participants in the Symposium and, in particular, Fred Zacharias for providing essential resources for this essay.

\*\* The *Fordham Law Review* relies on the author's translations for all Hebrew-language sources.

1. Philip S. C. Lewis, *Introduction* to 1 *LAWYERS IN SOCIETY: THE COMMON LAW WORLD* 1 (Richard L. Abel & Philip S. C. Lewis eds., 1988).

2. *See id.*; *see also* JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA passim* (1976); MARC GALANTE & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 2 (1991) (emphasizing the work of lawyers in big firms); *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION passim* (Robert L. Nelson et al. eds., 1992); DIETRICH RUESCHEMEYER, *LAWYERS AND THEIR SOCIETY: A COMPARATIVE STUDY OF THE LEGAL PROFESSION IN GERMANY AND IN THE UNITED STATES* 1-26 (1973).

between their duties to their clients and the often unclear or contradictory values of democracy itself.<sup>3</sup> This type of inquiry is largely theoretical (or conceptual); it tries to assess the potential tension between professionalism and democracy and how this tension can, or cannot, be ameliorated. From a different, descriptive perspective one can look into what lawyers *had actually done* (or are doing) to promote democracy or its underlying values. Lucien Karpik and Terrence Halliday's *Lawyers and the Rise of Western Political Liberalism* is a pathbreaking collection documenting lawyers' practices along this line of thought.<sup>4</sup> Yet from a third, normative point of view we can ask if lawyers, *qua* lawyers, *ought to* practice in a way that promotes democracy. And if so, why? And how? What are the professional justifications for this stance? And how should they reconcile their often contradictory public and private duties?<sup>5</sup>

Despite the different lenses through which these lawyer-democracy queries are posed, they all share a similar conceptual approach to the legal profession. Whether prescriptive, descriptive, or normative, lawyers are treated as a given, preexisting entity within democracy. Under all approaches, lawyers are the ones that do (or do not), can (or cannot), ought to (or ought not to) take part in shaping the democracies amidst which they work. It is a unilateral trajectory; lawyers "are" of a particular form of practice/ideology/ability/structure, whose impact upon democracy we examine.

In this essay, I adopt a different presupposition to the legal profession, and, in fact, my analysis proceeds in the opposite manner of the lawyer-democracy conundrum. I start from democracy, focusing on state institutions of a liberal democracy: legislature, judiciary, government, and—to a certain extent—the market. Then I proceed to inquire how these institutional settings influence the legal profession and partake in defining its character and its societal roles.

The study of the legal profession through the forces of state and market is not new, of course. It has occupied much of the literature examining the profession from a historical-sociological perspective.<sup>6</sup> Magali Sarfatti Larson has led the assertion that in the United States the market has been

---

3. Fred C. Zacharias, *True Confessions About the Role of Lawyers in a Democracy*, 77 FORDHAM L. REV. 1591, 1594 (2009). In the United States, lawyers owe an allegiance not just to their clients, but also to the legal system as officers of the court. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2007).  
Rule 3.3 of the Model Rules of Professional Conduct.

4. LAWYERS AND THE RISE OF WESTERN POLITICAL LIBERALISM (Terence C. Halliday & Lucien Karpik eds., 1997).

5. Zacharias, *supra* note 3, at 1595.

6. See, e.g., Dietrich Rueschemeyer, *Comparing Legal Professions Cross-Nationally: From a Professions-Centered to a State-Centered Approach*, 1986 AM. B. FOUND. RES. J. 415, 442 (noting the importance of state institutions in the study of "lawyers and law work"). Dietrich Rueschemeyer largely focuses on the structure of the profession and the type of work lawyers do and less on the inner tension within the professional role. *Id.*; see also Lucien Karpik, *Lawyers and Politics in France, 1814–1950: The State, the Market, and the Public*, 13 LAW & SOC. INQUIRY 707, 707–36 (1988).

the primary driving force behind lawyers' organization, and Gerald L. Geison has argued that the state has dominated the development of the legal profession in Europe.<sup>7</sup> However, most literature on this subject has focused on the structural aspects of the profession (the number of lawyers in a particular place, what they do, their work settings, who controls their practice). Scholars and commentators have given less attention to the impact of institutions in a liberal democracy on the normative/ethical basis of lawyers' professional attributes—in other words, to their role in defining and prioritizing lawyers' multiple commitments, in shaping their professional ideology, and, in reconciling their often conflicting private and public obligations. From this perspective, lawyers' "collective identity" is constructed and molded by external forces as much as from within the profession.<sup>8</sup>

To be sure, democratic institutions, in and of themselves, are not static or fixed entities. As essays in this volume demonstrate, despite historical continuity, democracies are ever-changing and are in a constant state of flux. Institutions gain strength or become weaker; they realign and are supplanted by alternative structural configurations. Such transformations lie at the heart of every live, vivid, and dynamic democratic polity. Moreso, although my analytical departure point is the impact of these institutions on the legal profession, I believe there is a mutual relationship such that "lawyers" and "democracy" continuously influence and constitute each other. Nonetheless, I believe there is value in switching the lens through which we usually assess the lawyer-democracy tie, putting the spotlight on lawyers as *objects of change* rather than its originator. This refocus allows us to identify the dynamics under which certain institutional arrangements shape the values underlying lawyers' work, and enables us to assess if they live up to their professional aspirations.

To understand how lawyers can be influenced by democratic dynamics, my research examines the legal profession in Israel. Israel is an interesting case study due to the rapid changes that have occurred in the relations between its democratic institutions in a relatively short period of time. Within six decades, there have been notable fluctuations in the balance of power between the legislature, the court, and government, and in general between state institutions, civil society, and the market. These, in turn, have had a direct impact on structural and normative aspects of the Israeli legal profession.

Part I of this essay explains the paradigm through which I examine the relationship between lawyers and democracy in Israel: regulation of the profession. I am referring to regulation in its broadest terms; in other words, the array of fundamental rules, rights, and duties that govern the way

---

7. MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977); *PROFESSIONS AND THE FRENCH STATE, 1700–1900* (Gerald L. Geison ed., 1984); see also Rueschemeyer, *supra* note 6, at 442–46 (calling for carrying out a state-centered analysis of the legal profession).

8. Karpik, *supra* note 6, at 735.

the legal profession operates. Since each regulator is prone to prefer a certain set of interests over others, the way lawyers are regulated can tell us about how different institutions understand their role. Part II describes the first era of lawyer regulation in Israel, characterized by professional autonomy and self-regulation. During this period, from the establishment of the state in 1948 until the mid-1980s, the bar and the bench were strongly unified to protect the independence of the judiciary, and the Israeli bar was freed of intervention from almost all state branches. Part III describes the changes in this regulatory regime in the last three decades. As market forces became the preferred site for resource allocation and the state turned into a regulator rather than a provider of public goods, the market for legal services, too, became a target for state regulation. The new regulatory arrangement, although fragmented and incoherent, nevertheless reflects a shift toward holding the legal profession more accountable to public ideals rather than self-interest. Part IV illustrates this change through an examination of a recent legislative amendment to lawyers' disciplinary procedures. Part V discusses a case study: the courts' imposition of civil liability upon lawyers toward unrepresented third parties. I conclude by providing an initial assessment on the future of lawyer regulation in Israel, as the profession becomes highly stratified, diversified, and specialized.

#### I. LAWYERS AND DEMOCRACY: THE QUESTION OF REGULATION

I explore the role of lawyers in the Israeli democracy through the question of professional regulation. My main argument is that since the 1990s the Israeli legal profession has been undergoing a notable shift from a strong regime of self-regulation to one of pluralistic regulation. Under these emerging changes, lawyers' terms of practice are being reset and determined by a multiplicity of external sources. Some are replacing self-regulation and some operate in congruence with self-regulation. This shift reflects a general tendency to strike a new balance between an Israeli lawyer's commitment to public interest on the one hand, and self-interest on the other—evidently strengthening the former.<sup>9</sup>

---

9. As is explained *infra* notes 28–29, many countries have employed anticompetitive measures to counter the monopoly of lawyers' bars and to enhance competition in the market for legal services. The most recent example is England's 2007 Legal Services Act. Legal Services Act, 2007, c. 29. The goal of the Legal Services Act is to "reform[] the way legal services in England and Wales are regulated and put[] the consumer interest at the heart of the regulatory framework." See Ministry of Justice, *Legal Services Act 2007*, <http://www.justice.gov.uk/publications/legalservicesbill.htm> (last visited Feb. 18, 2009); see also Legal Services Act, 2007, c. 29 (Eng.). See generally TERENCE C. HALLIDAY, BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT, at xiii (1987); CHRISTINE PARKER, JUST LAWYERS: REGULATION AND ACCESS TO JUSTICE 38–41 (1999). Most of these regulatory measures focus on preventing anticompetitive practices and opening up the market for legal services. My inquiry reaches beyond the question of the distribution of legal services and also examines the substantive norms that apply to lawyers within professional practice, and how they are regulated. See, e.g., Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167 (2003).

The way a particular society regulates its lawyers is telling of the way it defines the profession's role as carrier and protector of a vital public resource—law. Regulation also reflects the profession's relative strengths and weaknesses vis-à-vis other institutions (within the state, the judiciary, and the market), and the level of trust these institutions bestow upon the organized bar to live up to its acclaimed public duties.<sup>10</sup>

The questions relating to the regulation of lawyers can be divided into three submatters. Although related, and at times overlapping, from an analytical point of view it is useful to address them separately.

The first focuses on *the market for legal services* and inquires into the allocation of legal resources. From this angle we examine who is entitled to provide legal services and, from a regulatory perspective, who gets to decide this. Most societies define a certain sphere of exclusive jurisdiction in which only lawyers are permitted to provide legal services. This decision has a direct impact on the availability of such services, and raises questions about legal consciousness, litigiousness, and equal access to justice. Who determines the boundaries of this professional jurisdiction is a site for constant struggle between professions and external bodies.<sup>11</sup>

The second question relates to the *structural and organizational* forms of lawyers' activity. From this regulatory perspective we ask who determines and imposes entry requirements on the profession; who promulgates and enforces ethical codes; and who determines the relationship between members of the legal profession and the organized bar.<sup>12</sup>

The third aspect of legal regulation pertains to the *substantive norms and behavioral standards* that lawyers must follow. Who defines lawyers' fiduciary duties, professional competence, and duties to third parties; who determines what behavior unbecoming a lawyer is? From a regulatory angle, we inquire into the institutional arrangements that allocate the authority to determine and enforce such norms.<sup>13</sup>

Inquiring into lawyers' societal role through the question of regulation allows us to study the profession from an internal and an external point of view. The external perspective examines the legal profession's relationship with the government/administration, legislature, courts, and market actors, and assesses its status through the dynamics that take place between them.

---

10. On the connection between self-regulation and the critique against lawyers' self-interest, see DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 143–44 (2000). See also Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689, 1690–91 (2008).

11. On the connection between regulation and access to justice, see PARKER, *supra* note 9, at 38–41; RHODE, *supra* note 10, at 19.

12. For a strong argument that lawyers' self-interest in self-regulation is manifested in structural aspects of control, see AUERBACH, *supra* note 2, *passim*; Richard L. Abel, *United States: The Contradiction of Professionalism*, in 1 LAWYERS IN SOCIETY: THE COMMON LAW WORLD, *supra* note 1, at 186, 186–243.

13. See, e.g., David B. Wilkins, *Who Should Regulate the Lawyers?*, 105 HARV. L. REV. 799, 807–08 (1992).

This standpoint takes into account culture, history, and politics as determinate factors in the continuous institutional power struggles of lawyers within a given political environment.<sup>14</sup> Regulation is a site for such struggle: lawyers' claim for self-regulation has been utilized to demand and achieve autonomy and to minimize external intervention in setting lawyers' terms of practice. Courts, in turn, have often imposed duties on lawyers toward nonclients and third parties, even when they contradicted the bar's traditional stands, by use of civil claims.<sup>15</sup> Legislatures have enacted legislation that set heightened reporting standards for corporate lawyers.<sup>16</sup> All these forms of direct and indirect regulation transform professional duties and requirements. They often have distributive outputs and alter the substantive rights of people who may be impacted by lawyers' work.

From an internal point of view, the regulation of lawyers touches upon an inherent professional tension: client loyalty and public role. Lawyers must act as zealous advocates for their clients and at the same time must serve as officers of the court or the justice system at-large.<sup>17</sup> Balancing these obligations sets the normative standards by which lawyers must abide, demarcating the lines between client loyalty and public concern.

When we regulate something, we do so with some particular interests in mind. Therefore, the entity that sets the standard for lawyers' conduct is likely to do so according to its own incentives and viewpoint about the proper weight of each interest.

With the risk of oversimplification, I suggest that lawyers' self-regulation in Israel has strongly preferred clients' interests and lawyers' self-interests over their duties to the public, to the courts, and to third parties. In other words, self-regulation is strongly correlated with self-interest regulation.<sup>18</sup> To be sure, Israeli lawyers have always claimed that they serve the public

---

14. For examples of this approach, see AUERBACH, *supra* note 2, at 263–308; LARSON, *supra* note 7; LAWYERS AND THE RISE OF WESTERN POLITICAL LIBERALISM, *supra* note 4.

15. Wilkins, *supra* note 13, at 806 (claiming that, “[a]lthough bar leaders and others have tried to separate ‘malpractice’ from ‘discipline,’ these efforts have been largely unsuccessful”); Limor Zer-Guttman, *Yitsug Mul Tsad Shekeneged Bilti Meyutsag—Yizaher Orech Hadin [The Lawyer’s Duty to Unrepresented Opposing Party: A Caveat]*, 1 DIN UDVARIM 153 (2004) (Isr.).

16. Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics and Enron*, in ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS 625, 648–52 (Nancy B. Rapoport & Bala G. Dharan eds., 2004).

17. As an advocate, a lawyer should act zealously to further a client’s interests, safeguard her secrets, avoid conflicts of interest, and in general abide by the client’s will regarding goals of the attorney-client relationship. As an officer of the court, a lawyer may not assist a client in fraudulent behavior, unreasonably delay litigation, or act in any other manner that is not candid toward the court.

18. See David Barnhizer, *Profession Deleted: Using Market and Liability Forces to Regulate the Very Ordinary Business of Law Practice for Profit*, 17 GEO. J. LEGAL ETHICS 203, 225 (2004); Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411, 419 (2005) (citations omitted); Randy Lee, *The State of Self-Regulation of the Legal Profession: Have We Locked the Fox in the Chicken Coop?*, 11 WIDENER J. PUB. L. 69 (2002).



interest above their own—this has been necessary to maintain the professional privileges they possess. Nonetheless, more often than not the Israeli bar has professed strong self-interest as a central driving force behind claims for self-regulation, despite cloaking them as furthering a public interest. As Deborah Rhode explains,

The problem is not that bar policies are baldly self-serving. Lawyers and judges who control regulatory decisions generally want to advance the public's interests as well as the profession's. Rather, the difficulty is one of tunnel vision . . . . No matter how well intentioned, lawyers and former lawyers who regulate other lawyers cannot escape the economic, psychological, and political constraints of their position.<sup>19</sup>

Comparably, the legislature, the Ministry of Justice (MOJ), and the courts in Israel have expressed a mixed record on balancing competing interests and have tended to give the public's interest more value. These institutions often consider themselves the best representatives of the justice system as well as the public interest, better suited to protect the public from the strong self-interest/client interest denoted by the bar. In Israel, too, the emergence of multiple sources of regulation correlates with a tendency to weaken self-interest of the bar and to give some preference to other objectives.<sup>20</sup>

In sum, examining the legal profession through “the politics of regulation” can offer a broad array of insight into the polity within which lawyers work. Such an examination can tell us about the distribution of legal resources and the allocation of rights, and is a unique angle through which to learn about a society's engagement with lawyers as agents of law.

At this juncture, it is appropriate to spell out my normative viewpoint about lawyers' role in a democratic society. My assumption is that lawyers carry a heightened duty to protect democracy and its underlying values beyond providing representation to individual clients and working out the adversarial system. This is so because of the type of commodity they handle—law. Law has a number of roles in a democracy, one of them being the resolution of disputes in an orderly manner. For this purpose lawyers can indeed claim that adversarial individual representation is the way they further this objective.<sup>21</sup> But law also has other roles: inducing behavioral patterns;<sup>22</sup> facilitating transactions and maintaining order;<sup>23</sup>

---

19. RHODE, *supra* note 10, at 143–44.

20. On the correlation between self-regulation of ethical rules and a strong client-centered approach, see Fred C. Zacharias, *Integrity Ethics* (Univ. of San Diego Sch. of Law Legal Studies Research Paper Series, Research Paper No. 08-056, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1221722](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1221722).

21. On the multiple roles of law see, for example, JOSEPH RAZ, *The Functions of Law, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 163 (1979).

22. In the criminal context, see, for example, CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS* (Henry Paolucci trans., Bobbs-Merrill Co., Inc., 1963) (1764); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

23. ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* *passim* (1991).

protecting vulnerable groups; and promoting equality (resource and power distribution).<sup>24</sup> And since law is what lawyers do, lawyers cannot absolve themselves of their societal role by furthering only one of law's functions.<sup>25</sup> In principle, this normative position about lawyers is not disputed, although its extent and scope often is.<sup>26</sup> Given this assumption, my essay will continue to be descriptive in its nature; whatever definition we adopt of the public-social role of lawyers, I believe it does not originate only from within the profession (a self-defined "collective identity"), but is often imposed upon lawyers by external bodies, through regulation.

## II. LAWYERS IN ISRAEL: THE FIRST ERA—SELF-REGULATION

Regulation of the Israeli legal profession has changed in the last two decades from a rigid and expansive self-regulatory system toward heightened intervention from multiple external sources.<sup>27</sup> To be sure, Israel was not alone in introducing regulatory changes in the provision of legal services, and many countries opted for reform by imposing antimonopolistic and anticompetitive rules upon the bar. This oftentimes resulted in deregulating the market for legal services, and in general lessening state control over lawyers' practices. The underlying assumption of such policies has been that ending monopolies and transferring the

---

24. For a complex view of law's weaknesses and strengths in promoting social change, see, for example, GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008).

25. See, e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

26. In fact, lawyers have been criticized for having too much independence both from the Right and the Left. For a claim against client dominance from the Right, see MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 57 (1990) ("[T]he attorney acts unprofessionally and immorally by depriving clients of their autonomy . . . by . . . preempting their moral decisions or by depriving them of the ability to carry out their lawful decisions."). See also Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613. Answering the claims of client dominance from the Left, see William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099, 1101 (1994).

27. Fred Zacharias claims that lawyers are and have been heavily regulated by external sources, and therefore discussions regarding changes in regulatory regimes fall short of acknowledging this complexity. See Fred C. Zacharias, *The "Self Regulation" Misnomer*, in REAFFIRMING LEGAL ETHICS: TAKING STOCK AND NEW IDEAS (Reid Mortensen et al. eds., forthcoming 2009); Fred Zacharias, *The Myth of Self Regulation*, 93 MINN. L. REV. (forthcoming 2009). At the risk of sounding defensive, and without commenting on the debate in the United States, I will argue that in Israel self-regulation has indeed been the norm, and this is now changing. Moreover, Zacharias wants us to see judicial oversight of lawyers' ethical conduct as a form of external, rather than self-regulation. I agree that this ought to be the consideration, but note that in Israel judicial oversight of misconduct is not the norm. Rather, the Israel Bar Association is the body authorized to review and enforce lawyers' conduct, not the courts.

provision of legal services to the market will improve the allocation of qualitative legal services.<sup>28</sup>

It is doubtful whether competition theories have in fact led to more equitable or qualitative access to justice.<sup>29</sup> In Israel, however, opening the market for legal services to more competition was not the primary method to tackle self-regulation. Rather the process has infused some anticompetition measures aimed at eliminating anticompetitive actions together with the imposition of public duties upon the profession through direct and indirect regulation.

For decades, the Israeli-organized bar association had enjoyed almost unparalleled power over lawyers' practices. Eli Salzberger has shown that the bar association controlled most aspects of lawyers' practices. There is only one bar association in Israel and membership is mandatory for all lawyers. This bar association oversees apprenticeships and conducts entrance exams; it promulgates ethical rules; it has been authorized by the legislature to prosecute misconduct through disciplinary proceedings; and it adjudicates unethical behavior through internal disciplinary boards. External oversight has been extremely limited.<sup>30</sup> Unauthorized Practice of Law (UPL) rules are very broad, and almost all legal work is restricted to lawyers.<sup>31</sup> Until the mid-1990s, anticompetition rules limiting internal and external competition were prevalent. They included prevention of solicitation, imposition of minimum fees, and prohibitions on advertising and on practicing additional vocations parallel to lawyering.<sup>32</sup> This stable monopoly remained unchallenged for at least three decades, since the establishment of the state in 1948 until the mid-1980s. The bar association encountered no dissent from within the profession, nor from the courts and the state (legislature and government agencies).

During this era, the bar and the bench (mainly the Israeli Supreme Court) created an aligned "front" vis-à-vis the state and its political apparatus. Salzberger, Isaachar Rosen-Zvi, and I have demonstrated how the Israeli Supreme Court provided broad support to the bar on the structural and normative aspects of lawyers' organization and work. The court rarely intervened in matters relating to the legal profession and endorsed most of

28. PARKER, *supra* note 9; Hadfield, *supra* note 10, at 1694.

29. PARKER, *supra* note 9, at 39.

30. Issachar Rosen-Zvi, *Constructing Professionalism: The Professional Project of the Israeli Judiciary*, 31 SETON HALL L. REV. 760, 780 (2001); Eli Salzberger, *Keshet Hamishpetanim Hayisraeli: Al Lishkat Orkhe Hadin Uba'ale Brita [The Israeli Jurists Conspiracy: On the Israeli Bar and its Allies]*, 32 MISHPATIM 43 *passim* (2001) (Isr.); Neta Ziv, *Combining Professionalism, Nation Building and Public Service: The Professional Project of the Israeli Bar 1928–2002*, 71 FORDHAM L. REV. 1621, 1640–49 (2003).

31. Neta Ziv, *Mi Heziz et Haglimah Sheli?—al Hasagat Gvul Miktsua Arikhat Hadin [Who Moved My Gown?—on Unauthorized Practice of Law in Israel]*, 24 MEHKERE MISHPAT 439, 454–56 (2008) (Isr.).

32. Limor Zer-Guttman, *Shmira al Kvod Hamiktsua Vetadmito Ufirsomet Le'orkhe Din [Preserving the Profession's Image and Legal Advertising]*, 24 MEHKERE MISHPAT 491, 494–98 (2008) (Isr.).

the bar's policies and decisions.<sup>33</sup> The court accepted the bar's claim that broad autonomy and self-regulation were legitimate and necessary to assure qualitative delivery of legal services. This approach reinforced the profession's broad autonomy and self-control, enshrined in legislation promoted by the organized bar in early Israeli statehood.

In previous research, I have suggested that this relationship characterized the first era of Israeli statehood, when the Supreme Court needed to establish the judiciary's independence from state politics in an emerging nation-state. The bar took part in this mission.<sup>34</sup> The bench and the bar carried a mutual interest to strengthen the autonomy of the legal profession—judges and lawyers alike—as a means to strengthen the independence of law in a new liberal democracy. From a sociological perspective, the legal profession was a cohesive network. Judges and lawyers were at social proximity—they belonged to similar social circles, and an ethos of collegiality prevailed within their ranks.<sup>35</sup>

As Gad Barzilai explains, during this era lawyers were not active or outspoken on issues of public concern in any organized fashion.<sup>36</sup> They took part in the larger project of nation building by remaining in the *private sphere*, representing individual clients, and minding their own affairs.<sup>37</sup>

Government and other public service lawyers (such as lawyers for the Jewish Agency or the Jewish National Fund) played a significant part in consolidating and legitimating state power (and the interests of the Jewish majority therein) through legislation and regulation.<sup>38</sup> However, this involvement encompassed only public/government lawyers. The majority of lawyers in private practice remained, in the words of Barzilai, “with no aspiration systematically to challenge the mobilisation of professional knowledge for national purposes.”<sup>39</sup> Nongovernment lawyers took no part in the collective project of Jewish nation building, but they also did not play a dissenting role as oppositional agents to state power. Lawyers did not consider themselves (nor were they considered by others) as advocates for

---

33. Rosen-Zvi, *supra* note 30, at 780–82; Salzberger, *supra* note 30, at 79–84; Ziv, *supra* note 30, at 1655–59.

34. Ziv, *supra* note 30, at 1651.

35. Rosen-Zvi, *supra* note 30, at 772.

36. Gad Barzilai, *The Ambivalent Language of Lawyers in Israel: Liberal Politics, Economic Liberalism, Silence and Dissent*, in *Fighting for Political Freedom: Comparative Studies of the Legal Complex and Political Liberalism* 247, 255 (Terence C. Halliday et al. eds., 2007).

37. *Id.* at 267–68.

38. On the role of law in the nationalization process, see, for example, *ETHNIC FRONTIERS AND PERIPHERIES: LANDSCAPES OF DEVELOPMENT AND INEQUALITY IN ISRAEL* (Oren Yiftachel & Avinoam Meir eds., 1998); *ISSACHAR ROSEN-ZVI, TAKING SPACE SERIOUSLY: LAW, SPACE AND SOCIETY IN CONTEMPORARY ISRAEL* (2004); Alexandre (Sandy) Kedar, *The Legal Transformation of Ethnic Geography: Israeli Law and the Palestinian Landholder 1948–1967*, 33 N.Y.U. J. INT'L L. & POL. 923 (2001); Oren Yiftachel, *Planning as Control: Policy and Resistance in a Deeply Divided Society*, 44 *PROGRESS IN PLAN.* 115 (1995).

39. Barzilai, *supra* note 36, at 254.

the disenfranchised, nor as lawyer-statesmen.<sup>40</sup> Their role, similar to that acknowledged in many emerging nation-states, was confined to importing political liberalism and its underlying basic values: individualism, separation of powers, and the formal guarantees of judicial independence and the rule of law.

On their part, the Knesset, the Israeli legislature, and the government revealed little interest in intervening in lawyers' affairs. The lack of state regulation was part of broader sociopolitical arrangements and economic structures of that time. The first decades in Israel were characterized by a strong and centralized state, which delivered most essential public services directly. Health, housing, employment, transportation, and infrastructure development were provided through the state apparatus, rather than the market. The absence of lawyers' regulation, thus, coincided with a polity in which regulation of the private sphere was overall minimal and, in fact, hardly wanting.

In sum, during the first era of Israeli statehood, lawyers had been successful in positioning themselves—and the allocation of legal services in general—in the private sphere. Consequently, they benefited from a regulatory system that only rarely intervened in such private provisions. The combination of a strong monopoly and an unregulated private sphere shielded lawyers almost entirely from any type of regulation. The organized bar held almost complete control over the internal structures of the profession and the allocation of legal services, and had little to account for in terms of lawyers' public duties and obligations. It had encountered no dissent from within its ranks and no significant challenges from outside agencies such as the state (the Knesset, the MOJ, or other government bodies), the judiciary, or private entities (such as competitors in the provision of legal services, insurance companies, and the like). This reality began to change in the mid-1980s, to which I now turn.

### III. SELF-REGULATION CHALLENGED

Changes in lawyers' regulatory regime are the outcome of a number of factors that took place in Israel since the 1980s.

#### A. *The Emergence of a Regulatory State*

The political and economic reality described above changed dramatically in the last three decades. Israel has shifted from a strong state-centered economy to a privatized, globalized, and liberalized economy. This preference for market allocation of public goods and services has emerged in a broad array of social and economic areas, including the liberalization of currency, financial institutions, and markets and in the privatization of infrastructure development (such as road construction),

---

40. On the role of lawyer as statesman, see generally ANTHONY T. KRONMAN, *THE LOST LAWYER: THE FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

telecommunications, the labor market, welfare services (Wisconsin Plans), healthcare (the erosion of universal health services and the rise of private healthcare), land administration, public housing, and pensions and other retirement plans.<sup>41</sup> These economic policies favored competition and called for the abolition of monopolies. Hence the monopoly held by the bar also lost its clout. It was viewed with growing distrust and resentment, serving the interests of its members on account of the general public.<sup>42</sup>

In this context it is important to note that lawyers were not only influenced by the liberalized and privatized globalizing economy in Israel, but also took a direct role in its formation and expansion. As explained by Barzilai, lawyers became agents in furthering, enabling, and sustaining these economic changes and market activities. They facilitated financial transactions, provided the necessary means for privatization, took part in liberalizing foreign currency markets, built up financial institutions, and globalized economic transactions. All this robust economic activity benefited lawyers, whose work was almost exclusively located in the private sphere. Lawyers benefited from Israel's economic growth because growth increased the legal needs of corporate clients; thus, lawyers became important vehicles of economic entrepreneurship and growth.<sup>43</sup>

The changes in Israel's political economy altered the basic relations between the state, civil society, and market. The expansion of market economy is typically accompanied by a rising level of state regulation, and this phenomenon occurred in Israel as well.<sup>44</sup> Accordingly, the new regulatory stance of the state—expanding intervention in market activities—had a direct impact on lawyers. As the market became a central source for delivery of (public) goods and services, and the state was assigned a stronger regulatory function, it was only a matter of time before new forms of regulation would reach the “market for legal services.” The economic landscape was therefore ripe for both market competition as well as state regulation of a field previously shielded from intervention.

Inasmuch as economic transformations played an important role in the regulation of Israeli lawyers, these transformations alone cannot explain the changes to the regulatory system. Additional factors played out in this process.

---

41. On the emergence of a regulatory state in Israel and privatization of public services and goods, see, for example, ISRAEL: THE DYNAMICS OF CHANGE AND CONTINUITY (David Levi-Faur, Gabriel Sheffer & David Vogel eds., 1999); DAVID LEVI-FAUR, HAYAD HALO NE'ELMAH: HAPOLITIKAH SHEL HATI'US BEYISRAEL [THE VISIBLE HAND: STATE-DIRECTED INDUSTRIALIZATION IN ISRAEL] (2001) (Isr.). On the demise of state dominance in welfare and labor, see Guy Mundlak, *Hamishim Shanah Lehaf'alat Hok Habituah Haleumi: Hahagigut Yitkaimu Bebet-Hamishpat [Fifty Years of the National Insurance Law: The Celebrations Will Take Place in the Courthouse]*, 67 BITAHON SOTSIALI 83 (2004) (Isr.). On the changes in the provision of health care, see Barzilai, *supra* note 36, at 253; Dani Filc, *The Health Business Under Neo-liberalism: The Israeli Case*, 25 CRITICAL SOC. POL'Y 180, 180–97 (2005).

42. Ziv, *supra* note 31, at 484 n.138.

43. Barzilai, *supra* note 36, at 255; cf. Hadfield, *supra* note 10, at 1695–96.

44. LEVI-FAUR, *supra* note 41, at 66–68.

B. *Jurisprudential Changes: More Law, More Lawyers*

Since the 1990s, the Israeli legal profession has grown dramatically in size. In 2006, the number of lawyers per capita in Israel was among the highest in the world—one lawyer per 200 residents—and it is still on the rise. From 1968 to 2005 the number of lawyers had increased by 1552%, while the population grew by 246%.<sup>45</sup> The influx in the number of lawyers has repeatedly been mentioned (by the general public and the state) as a reason and justification for tighter control over the profession. The bar, it has been argued, can no longer be solely trusted with handling such a complex, diversified, and expansive professional body.

From a jurisprudential viewpoint, the growth in the size of the profession came hand in hand with an overall “legalization” of Israeli society. Since the mid-1980s, “rights talk” has been on the rise, alongside increasing reliance on adjudication for addressing individual, social, and political conflicts. The number of court cases, in all categories and all courts, has risen at a much higher pace than demographic growth.

The legalization process has been twofold. First was the increasing turn to the Supreme Court to resolve public interest/social change oriented disputes that beforehand remained in the political, communal, or public sphere. The legacy of this development is associated with Chief Justice Aharon Barak and has drawn much controversy.<sup>46</sup> The second was the turn to adjudication in individual/personal relations, as well as commercial disputes. The findings above are true for both categories.<sup>47</sup> Much of this process of legalization was itself led by jurists—judges and lawyers alike,

---

45. Barzilai, *supra* note 36, at 256–57. This growth is of grave concern to the bar, as it has been attempting to curb this expansion and impose entry barriers into the profession, to the point of asking the government to intervene and restrict the number of lawyers allowed to practice. See Noam Sharvit & Ela Levi-Weinreb, ‘Orkhe-Din Bombach LeFriedman: “Tokh Shanim Sfurot Yih’yu 50 Elef ‘Orkhe-Din Beyisrael; ‘Atsor et Hatsafat Hamushmakhim Hahadashim o She’ efneh LeBaga”’s” [Ilan Bombach to Friedman: “In a Few Years There Will Be over 50,000 Lawyers in Israel; Stop the Overflow of the New Accredited or We Will Turn to the High Court of Justice”], GLOBES (Isr.), Sept. 3, 2008, available at <http://www.globes.co.il/news/article.aspx?QUID=1056,U1232915897801&did=10000378246>; Noam Sharvit & Ela Levi Weinrib, *Bombach LeBaga”’s: Horu Lešar Hamishpatim La ‘atsor Hatsafat Mikto’a ‘Orkhe-Hadin—Min’u Glishah Lemetsiut shel 50,000 ‘Orkhe-Din Beyisrael* [Bombach to the High Court of Justice: Order the Minister of Justice to Stop Overflow of the Profession—Prevent the Flow of 50,000 lawyers into Israel], GLOBES (Isr.), Oct. 26, 2008, available at <http://www.globes.co.il/news/article.aspx?QUID=1055,U1232916919542&did=1000391563>; Noam Sharvit & Ela Levi-Weinreb, *Shuk ‘Arikhat Hadin Beyisrael Ravui Bamishpatanim. Haim Tsarikh La’atsor et Hahatsafah? Haim Kedai Lesgor Lifahot 3 Mikhlahot? [The Lawyers’ Market in Israel Is Saturated with Jurists. Should the Flow Be Stopped? Should at Least Three Law Colleges Be Closed?]*, GLOBES (Isr.), Oct. 29, 2008, available at <http://www.globes.co.il/news/article.aspx?QUID=1056,U1232917521105&did=1000392316>.

46. Gideon Sapir, *The Israeli Constitutional Revolution—How Did It Happen?* (Bar Ilan Univ. Pub. Law Working Paper No. 08-02, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1082230#](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1082230#).

47. See Barzilai, *supra* note 36, at 265–67.

who created a demand for lawyers' services and broadened the scope of judicial intervention.

Concomitantly, there has been a sharp increase in the number of students entering law school in Israel. This in turn has triggered changes in the supply of legal education. Similar to other countries, legal education is considered a jumping board for professional development beyond legal practice per se; but many Israeli law graduates take the bar exam, enter the profession, and practice law at least temporarily.

Despite the proclaimed hardships of lawyers in small firms and of individual practitioners who complain of a harsh competitive professional market, the number of law students entering law schools has continued to rise in the last decade. In 1996, six thousand students began their law studies; in 2004, the number rose to fifteen thousand.<sup>48</sup> The demand for legal education was met with more liberalized state policies on the supply side of legal education. Since 2005, Israel's Council for Higher Education has approved the opening of three private law schools in the northern and southern parts of the country, joining four research-based public law schools, and five private colleges, altogether graduating over two thousand law students per year.<sup>49</sup> Many of these law school graduates belong to social groups that had previously been excluded from the profession: new immigrants, Arabs, Ultra Orthodox, and students from the periphery. This diversification is no doubt a positive development. However, this rise in numbers does not necessarily correlate with enhanced access to justice, competence, or professional social responsibility. The growing number of law students, in turn, triggered calls for tighter professional regulation.

This growing turn to law came about against rigid and restrictive rules on Unauthorized Practice of Law in Israel. The law governing the provision of legal services reserves lawyers' exclusivity in a broad scope of activities, including provision of "legal advice," drafting of "documents of a legal character," and representation before numerous judicial, administrative, and quasi-judicial bodies.<sup>50</sup> The Israel Bar Association, on its part, has been

---

48. ISR. COUNCIL FOR HIGHER EDUC., STUDENTS IN INSTITUTIONS OF HIGHER EDUCATION BY LEVEL OF DEGREE, TYPE OF INSTITUTION AND FIELD OF STUDY tbl.10 [hereinafter ISR. COUNCIL FOR HIGHER EDUC. 2004-05 DATA], available at [http://www.che.org.il/download/files/table\\_10.xls](http://www.che.org.il/download/files/table_10.xls) (last visited Feb. 18, 2009); ISR. COUNCIL FOR HIGHER EDUC., STUDENTS IN INSTITUTIONS OF HIGHER EDUCATION BY LEVEL OF DEGREE AND FIELD OF STUDY 1996, 2001, 2004-05, at tbl.9 [hereinafter ISR. COUNCIL FOR HIGHER EDUC. 1996, 2001, 2004-05 DATA], available at [http://www.che.org.il/download/files/table\\_9\\_3203.xls](http://www.che.org.il/download/files/table_9_3203.xls) (last visited Feb. 18, 2009); see also Ofri Ilani, *Hatstudentim Ma'difim Mishpatim Uvorkhim Mehig-Tech [The Students Prefer Law and Are Leaving High-Tech]*, HAARETZ (Isr.), Oct. 25, 2008, available at <http://www.haaretz.co.il/hasite/pages/ShArt.jhtml?itemNo=1031250&contrassID=&subContrassID=0&sbSubContrassID=0>.

49. According to the data of the Council for Higher Education, in 2006, 81% of law students studied in private law colleges, as compared to 6.5% in 1996. ISR. COUNCIL FOR HIGHER EDUC. 2004-05 DATA, *supra* note 48; ISR. COUNCIL FOR HIGHER EDUC. 1996, 2001, 2004-05 DATA, *supra* note 48. The new colleges that were approved were Haifa Law College, Tzfat Law College in the Galilee, and Sapir Law College in the South.

50. Bar Association Act, 5721-1961, 15 LSI 196, 199 § 20 (1960-61) (Isr.). On the Unauthorized Practice of Law Rules in Israel, see Ziv, *supra* note 31.



enforcing UPL rules vigorously. It wants to ensure that the newly acquired legal work remains within the jurisdiction of the legal profession. In doing so it has relied on traditional claims of lawyer expertise and the need for consumer protection.<sup>51</sup>

Accordingly, in order to take part in the resolution of disputes—“legalized” under a stronger rights culture and against a robust rising economy—reliance on lawyers became vital. On the one hand, Israelis turned to law and to legal services in more areas of life; on the other hand, only lawyers were authorized to provide such legal services.<sup>52</sup> If one wanted to practice within the justice system, one needed to become a lawyer. UPL laws account for the rise in the number of lawyers in Israel as well.

Notwithstanding the expansion in the number of lawyers, law students, and legal needs, and similar to evidence from other countries, there is no proven link between the number of practicing lawyers and the equitable availability of legal services or a higher level of professional competence or social responsibility. As Christine Parker suggests, “It is naive to expect the market in justice ever to be organized so efficiently that the majority will be able to afford the services they need.”<sup>53</sup> On the contrary, competition has often led to “races to the bottom,” under which lawyers adopted a stronger adversarial and client-centered approach in the hope that this stance will be rewarded by clients’ preferences. In Israel, too, anecdotal evidence suggests that internal competition is a worry for the bar due to the growing severity of the complaints about lawyer misconduct.<sup>54</sup>

---

51. Cf. Richard Moorhead, Avrom Sherr & Alan Paterson, *Contesting Professionalism: Legal Aid and Non Lawyers in England and Wales*, 37 LAW & SOC’Y REV. 765 (2003); Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 239 (2002); Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEGAL ETHICS 209 (1990); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981).

52. Cf. Hadfield, *supra* note 10 (discussing the connection between the profession’s control over the market for legal services and the rising reliance on lawyers for corporate work).

53. PARKER, *supra* note 9, at 41 (providing information on discrepancies between increased market competition for legal services and availability of lawyers, depending on the type of service and clients); see also RHODE, *supra* note 10, at 118 (“For most Americans, the most significant problem involves not too much but too little: too little access to justice and too few choices about legal services and dispute resolution processes.”).

54. The number of complaints against lawyers has not changed significantly between 1999 and 2004, and remains at an average of about 2700 complaints per year. See EFRAT KAUL GRANOT, KNESSET RESEARCH & INFO. CTR., RIKUZ NETUNIM AL HALIKHIM MISHMATI’IM NEGED ‘ORKHE DIN [DATA ON DISCIPLINARY PROCEEDINGS AGAINST LAWYERS] (2004) (Isr.), available at <http://www.knesset.gov.il/mmm/data/docs/m00767.doc>. The Tel Aviv Bar District Committee prosecutor has informed me, however, that in 2008 there was a rise in the number of disciplinary indictments filed against lawyers in the Tel Aviv district, the largest in the country. Interview with Amos Weitzman, Head Prosecutor, Tel Aviv Bar Ass’n Dist. Comm. (Nov. 16, 2008). The average of disciplinary indictments has been about 200 per year, and for 2008 it is expected to be around 250. In addition, his impression is that a growing number of lawyers are involved in unbecoming behavior that he relates to growing

Legal needs of the poor are not met by the growing number of lawyers entering the profession.<sup>55</sup>

Thus the “explosion in litigiousness,” as it is often called, and the failure of lawyers to adapt the availability and quality of their services to growing legal needs have served as additional incentives for tighter regulation of the market for legal services, lawyers included.<sup>56</sup>

### C. *Institutional Realignment of the State, the Bench, and the Bar*

A different kind of change that ought to be accounted for in order to understand the transformation in the regulation of lawyers in Israel is the notable rift between the bench and the bar. This schism had developed over the last two decades, and should be understood as part of a broader institutional realignment of the bar, the state (the Knesset and the MOJ), and the judiciary. Under this new institutional order, it is no longer possible to identify a unified or stable alliance among these institutions. Rather, there is a shifting, ad-hoc positioning among them, representing the contingent and nonhomogenous nature of these bodies.

The disengagement between the bench and the bar—a stark change from past affinity—can be perceived through a variety of venues. A notable one, for example, has been the bar’s project of “Judges’ Review,” a questionnaire distributed to lawyers asking them to evaluate judicial performance, initiated in 2001. The project was met with fervent opposition from the judiciary. In 2002, a crisis broke out between the judges and the bar, which included a “ban” imposed by the judges on participating in activities organized by the bar, with mutual accusations in

---

competition: no-show for court hearings (due to duplicate scheduling), submission of motions without getting the consent of the opposing party, and use of language unbecoming a lawyer. *Id.* There is also a growing number of lawyers involved in criminal investigations, some of which are severe (e.g., drug smuggling, connections to organized crime). Additionally, more lawyers are accused of offenses that are economic in nature (e.g., writing checks without financial coverage). *Id.* Although this data is anecdotal at this stage of the research, it does indicate some correlation between the growing competition and unethical behavior.

55. There is no official research on the legal needs in Israel. Information on the availability of legal services to the poor, however, illustrates a growing want in this area. *See* YIFAT SHAI, KNESSET RESEARCH & INFO. CTR., GUFIM HAM’ANIKIM SIU’A MISHPATI BELO TASHLUM LEMEUTE YEKHOLET [BACKGROUND PAPER FOR DISCUSSION: BODIES PROVIDING FREE LEGAL SERVICES TO PEOPLE WITH LIMITED MEANS] (2004) (Isr.) (noting the rise in people requesting state legal assistance as well as assistance from nongovernmental organizations between 2001 and 2003); *see also* Knesset, Committee of Public Complaints Protocol of Proceedings: Pniyot Tsibur shel Anashaim Hazkukim Lesiyua Mishpati Ve’ein Be’efsharutam Lemamno [Public Inquiries of People in Need of Legal Services Who Cannot Afford to Pay] (2004), *available at* <http://www.knesset.gov.il/protocols/data/html/zibur/2004-03-17.html> (discussing the immense unmet legal needs that are not addressed by the state, the bar, and civil society).

56. On similar trends in the United States and other countries, *see* RHODE, *supra* note 10, at 120–25.

the press. Although the heat over this particular conflict has now subsided, it signaled the dynamics of a new era.<sup>57</sup>

Alliances between politicians (members of the Knesset and government officials) and lawyers on the controversial topic of the Israeli Supreme Court's acclaimed "activism" illustrate another realignment of this sort. Since the late 1990s, the Supreme Court has been under growing political (and academic) condemnation due to accentuated "judicial activism" led by then-Chief Justice Barak. The critics, who had challenged the alleged inflated jurisdiction of the Supreme Court and had criticized the growth of its institutional power, were mainly politicians—Knesset members as well as government ministers. However, they were often supported by members of the bar (or some of its more vocal members), as well as members of the legal academy.<sup>58</sup> This repositioning on crucial issues of the justice system signals a grave transformation from previous ties between lawyers and judges, ties that were based on mutual protection and support, united vis-à-vis the state.

The legislature has increased its intervention into lawyers' affairs as well. Both the Knesset and the MOJ have demonstrated a clear proactive approach toward lawyers' regulation. Contrary to negligible legislative activity in the previous era, the Israeli parliament, the Knesset, and the MOJ have introduced numerous legislative initiatives pertaining to the bar and to lawyers' affairs. More than once legislation was proposed, and later adopted, despite the strong objection of the bar. At times, legislation of this sort targeted professional activity directly (for example, a legislative amendment imposing structural reform on the bar's disciplinary proceedings, or an amendment to allow non-Israeli lawyers to practice in Israel under certain conditions).<sup>59</sup> In other matters, legislation related to issues in which lawyers had vested interests and was adopted despite the bar's strong objection. For example, an amendment to the Execution Act was passed limiting the imposition of civil imprisonment for debt despite the bar's vehement opposition voicing the interests of strong creditors.<sup>60</sup>

State agencies have also adopted a more critical approach to lawyers' professional standards. The Israeli Securities Exchange Authority, for

---

57. Barzilai, *supra* note 36, at 266; Salzberger, *supra* note 30.

58. Barzilai, *supra* note 36, at 267.

59. On this point, see Mark Schon, *Bil'adi: Se'if Behok Hahesderim 2009 Yeafsher Leorkhe Din Zarim Lif'ol Ba'arets* [Exclusive: A Section in the 2009 Arrangement Act Will Permit Foreign Lawyers to Work in Israel], *CALCALIST* (Isr.), Aug. 6, 2008, available at <http://www.calcalist.co.il/local/articles/0,7340,L-3100185,00.html> (describing the bar's objection to a legislative amendment that would allow non-Israeli lawyers to practice in Israel).

60. The bill was passed on November 4, 2008, after five years of legislative debate. The amendment limits the circumstances in which civil imprisonment can be imposed on debtors and provides better protections to debtors who are unable to pay debts. The Israeli Bar Association was one of the most rigorous opponents to this reform, and some of the objections posed by the bar were incorporated into law. However, the bar could not hinder this reform altogether. Amendment to the Execution Act of 1965 (no. 29), 2008, S.H. 2188 (Isr.).

example, has attempted to heighten the duties of in-house counsel in public corporations trading in the Securities Exchange, expecting them to serve as gatekeepers against corporate financial fraud.<sup>61</sup> The CEO of Israel's Securities Exchange Authority expressed this view clearly, telling lawyers, "[Y]ou—legal counselors—both internal and external—are in my view gatekeepers, you are non-frivolous elements in the control mechanisms that ensure the cleanliness of the financial markets . . . ."<sup>62</sup> Needless to say, the bar association rejects this view outright, placing client confidentiality as a trumping interest over and above all others. Similarly, the Israel Money Laundering Prohibition Authority has also expressed its intentions to expand the duties imposed on lawyers to report financial irregularities and violations of this law, narrowing the scope of lawyer-client confidentiality. The bar association, not surprisingly, opposes these proposals.<sup>63</sup>

All of these changes occurred as the bar association itself came under growing criticism from within its rank and file, beginning in the 1990s.<sup>64</sup> As the number of lawyers increased, the profession became highly diversified and stratified. Internal rivalries emerged, and lawyers became more outspoken against the organized bar. Some lawyers initiated legal proceedings challenging the bar's restrictive practices, while others demanded that it become more accountable to public concerns. The debate over the establishment of a pro bono program in 2002 illustrates this schism. While the bar's leadership at the time vowed to set up a voluntary pro bono program, there were segments within the organization that strongly objected to this initiative.<sup>65</sup> It was no longer possible to talk about the interests of a homogenous profession, as special interest groups—young lawyers, personal injury lawyers, Arab lawyers, gay and lesbian lawyers, to mention a few organized groups—brought forth divergent positions of lawyers' professional ideology.

Against this backdrop, the legal profession—judges, lawyers, legal academia—no longer stands as a unified front vis-à-vis the state and the political apparatus. The traditional affiliation between the bench and the bar has been replaced by a more nuanced and tentative relationship, which designates a new role to the state and reallocates power among the three branches of government under the stronger influence of market forces. Under the new order, these institutional actors are neither in total alignment

---

61. See, for example, the head of the Israel Securities Authority, Moshe Tari, in a Continuing Legal Education talk, in which he defined lawyers primarily as gatekeepers of the law and markets, not protectors of client confidentiality. Moshe Tari, *Shomre Saf Beta'agidim Medavhim* [Gatekeepers in Corporations Are Reporting], NFC NEWS, Nov. 22, 2006, available at <http://www.nfc.co.il/Archive/003-D-19087-00.html?tag=23-41-45>.

62. *Id.*

63. See Itai Har-Or, *Orekh-Din Tel-Tsur: "Hok Isur Halbanat Hon Lo Hevi Letsimsum Irgune Hapeshiah"* [Tel Tzur: "The Laundering Prohibition Act Has Not Harmed Criminal Organizations"], CALCALIST (Isr.), Sept. 23, 2008, available at <http://www.calcalist.co.il/local/articles/0,7340,L-3122622,00.html>.

64. Ziv, *supra* note 30, at 1659, 1661–62.

65. *Id.* at 1665.

nor in overall contestation or contention. They side with each other in some areas, depending on perceived interests and political considerations. This is a fractured, fragmented positioning, in which discrete linkages on ad hoc or limited bases are formed, while in other areas, the institutions differentiate and assume opposing stands.

These shifts are expressed through, as well as influenced by, changes in the regulation of lawyers (or lawyering regulations or standards). The past affinity between the bench and the bar was reinforced by a particular regulatory arrangement: an autonomous bar and broad self-regulation. In contrast, the fragmented and nuanced alliances described above are also reflected in lawyers' regulatory arrangements that, in turn, are not coherent and stable. On some counts the Supreme Court has been wholly supportive of the bar and its interests. Such have been the Supreme Court rulings dismissing challenges to the bar's monopoly, to mandatory membership and fees, and to challenges of UPL rules.<sup>66</sup> On other issues, the same court operated as a practical regulator, setting substantive normative professional standards that sharply differ from those accepted by the bar. Such was the case when the Supreme Court invalidated an ethical rule that restricted clients from switching lawyers pending a fee dispute,<sup>67</sup> or cases, discussed *infra* Part III, in which the court imposed heightened fiduciary duties upon lawyers toward third parties and toward the court.

Altogether, these moves illustrate an incremental, nonlinear, and fragmented intrusion into the bar's well-entrenched autonomous system of self-regulation. The moves have not been uniformly coordinated. They take place in a piecemeal manner, rather than through a comprehensive "top-down" reform. Overall the Israeli bar is still quite powerful and lawyers still hold much control over their own affairs; at present the bar is able to discard all-encompassing structural regulatory reforms. Changes in regulations and in the redefinition of the public and private duties of lawyers have therefore been taking place through "bottom-up," multidimensional, and encroaching patterns that challenge well-established regulatory arrangements.

Overall, however, and despite its fragmented nature, the emergence of a new regulatory framework is not merely a structural change; it reaches beyond a shift in relative powers of the profession, the state, the judiciary, and the market. I suggest that it signifies an attempt to redefine lawyers' professionalism—to strengthen their public functions and enhance their societal duties. The new regulatory framework aims to do so in all dimensions described above: allocation of legal resources, entry barriers to practice, structural and organizational conditions of practice, and lawyers' substantive norms and standards of behavior.

---

66. On the monopoly of the bar, mandatory membership, and fees, see HCJ 2334/02 Shtangar v. Knesset Chair [2003] IsrSC 58(1) 786. On reaffirming the restrictions on the ethical rule prohibiting lawyers from working with nonlawyer entities, see HCJ 9596/02 Pitsuy Nimrats v. Minister of Justice [2004] IsrSC 58(5) 792.

67. HCJ 4330/93 Ganem v. Isr. Bar Ass'n Tel Aviv Dist. [1996] IsrSC 40(3) 221.

The next parts exemplify this process by an analysis of two cases: (i) legislation implementing changes in disciplinary proceedings of the bar; and (ii) liability rules developed by civil courts imposing heightened fiduciary obligations upon lawyers toward nonclient third parties.

#### IV. DISCIPLINARY PROCEEDINGS AND PROFESSIONAL AUTONOMY

One of the central aspects of professional self-regulation is control over discipline. Disciplinary proceedings constitute an institutional venue for supervising, monitoring, and setting norms of behavior for a designated group—in our case, lawyers. In the case of the Israeli bar, disciplinary proceedings have always been considered a central site for exerting professional independence. Thus, the identity of the body authorized to regulate lawyers' behavior, set its standards, and enforce them continues to be of central importance.

Before the enactment of the Israel Bar Association Act (IBA Act) in 1961, disciplinary proceedings were under the jurisdiction of the courts. As membership in the lawyers' association was voluntary, sanctions against lawyers who departed from accepted behavioral norms could not be mandated by the organized profession. Only those lawyers who opted to become members of the Jewish Lawyers' Association were subject to its jurisdiction.<sup>68</sup> In 1961, as part of the comprehensive legislative move to establish a unified bar with extensive control over lawyers' affairs, membership in the bar association became mandatory,<sup>69</sup> and the bar was authorized to administer entrance exams and to regulate admittance of apprentices to the profession.<sup>70</sup> In addition, lawyers demanded and received exceptionally broad authority to determine and enforce professional behavioral standards.

Until the 2008 reform, discussed in this section, the bar's control over ethical rules covered all stages of the disciplinary process: promulgation of ethical rules (through the bar's legislative body, the National Council),<sup>71</sup> initiation of disciplinary proceedings (the bar's District and Central Committees),<sup>72</sup> adjudication of disciplinary proceedings (regional and national disciplinary boards),<sup>73</sup> and punishment.<sup>74</sup> Eli Salzberger claims

---

68. Ziv, *supra* note 30.

69. Israel Bar Association Act, 5721–1961, 15 LSI 196, 202 § 42 (1960–61) (Isr.), amended by Amendment to Israel Bar Association Act (no. 7), 5731–1971, 25 LSI 173, 174 (1970–71) (Isr.).

70. *Id.* §§ 39–40 (entry exams) (amended 1971); *id.* §§ 26–37, 41, 41A (amended 1971) (apprenticeship).

71. *Id.* §§ 53–63, 109.

72. *Id.* § 63. Although parallel authority to initiate disciplinary proceedings has been granted to the Attorney General and to the State Prosecutor, these officials rarely make use of their prosecutorial power.

73. *Id.* §§ 14–18.

74. *Id.* §§ 68–69.

that such an expansive control over lawyers' behavior is unprecedented in comparative standards.<sup>75</sup>

Adjudication of disciplinary proceedings has taken place with very little external oversight. Members of the regional and national disciplinary board—that is, lawyers only—were appointed by the bar association. No public representatives were involved in their appointment or took part in adjudicating disciplinary proceedings. As a matter of practice, members of the disciplinary boards were appointed by the bar's regional committees according to lists that had been agreed upon by opposing sections of the bar, with no public oversight or review.<sup>76</sup> This method of appointment exposed the process to severe political manipulation and influence.

The decisions of the bar's disciplinary boards could be appealed to the Supreme Court, sitting as a court of appeals. However, only a small percentage of cases reached this stage. Overall, the disciplinary system had been highly controlled by lawyers, with very limited external or public checks.

This closed system was reinforced by a number of additional qualifications: the disciplinary hearings were not open to the public and were held in closed camera;<sup>77</sup> the decisions of the courts were not published and could not be accessed by interested parties or the public; and the most severe punitive measures imposed by the court (suspension of license and expulsion from the bar) were automatically stayed pending an appeal.<sup>78</sup> In sum, despite some outlets to extraprofessional checks, the system on the whole operated in a self-contained manner, to an extent foreign even to similar professional systems that enjoy a relatively high level of self-regulatory privileges.<sup>79</sup>

It is therefore not surprising that the public image of lawyers' self-enforcement practices suffered from low esteem: disciplinary proceedings were often criticized as being unfair, arbitrary, and politicized, from an internal and an external perspective. From within, they were too closely tied to the everlasting rivalries within the bar; from the outside, these proceedings were not effective in policing the most severe deviances and were not enforced evenhandedly.<sup>80</sup>

---

75. Salzberger, *supra* note 30; see also LIOR BEN DAVID, THE KNESSET RESEARCH & INFO. CTR., TIPUL BE'AVEROT MISHMA'AT SHEL ORKHE DIN: MABAT MASHVE [THE TREATMENT OF LAWYERS' DISCIPLINARY OFFENCES: COMPARATIVE LOOK] (2004) (Isr.) [hereinafter KNESSET DISCIPLINARY REVIEW DOCUMENT], available at <http://www.knesset.gov.il/mmm/data/docs/m00920.doc>.

76. Pursuant to the Israel Bar Association Act, members of the disciplinary boards are elected by lawyers in general regional elections. 15 LSI §§ 14–15. De facto, the board members were chosen and appointed from a list, which was agreed upon by different segments of the bar.

77. The disciplinary court could decide to permit the presence of third parties or to open the court, but as a matter of course the hearings were held in camera. NAT'L BAR ASS'N R. 73 (Isr. Bar Ass'n).

78. See *Id.* R. 72.

79. See KNESSET DISCIPLINARY REVIEW DOCUMENT, *supra* note 75.

80. See Ziv, *supra* note 31, at 483–84.

This broad self-regulatory arrangement remained for decades, despite occasional critique and grievances aired in the media or in public debates.<sup>81</sup> In the mid-1990s, however, winds began to change. In 1994 then-Minister of Justice David Libai appointed a committee chaired by retired District Court Justice Shaul Aloni to review the bar's disciplinary procedures and propose revisions to them.<sup>82</sup>

In 1996, a group of lawyers petitioned the Israeli Supreme Court, challenging the bar's practice of appointing judges to the disciplinary boards from agreed-upon lists instead of holding open elections. The Supreme Court rejected the petition, but voiced concern over the current procedure, stating that it was flawed and should undergo legislative change.<sup>83</sup>

In 1996, a group of Knesset members introduced a private bill of legislation to change the way judges are appointed to the disciplinary boards. In 1999, the State Comptroller issued a report on the bar's disciplinary courts, expressing disapproval of the appointment system that had included candidates from "a closed circle" of members and presently remains susceptible to political manipulation. The Comptroller's report noted that in most countries, disciplinary hearings are not under the exclusive control of the relevant bar and recommended opening up the proceedings to broader public involvement and review.<sup>84</sup>

In 2004, the Knesset Research and Information Center published a report on the bar's disciplinary proceedings, noting its anomalous self-regulatory powers from a comparative perspective.<sup>85</sup> Around the same time, some members of legal academia started writing critically about the bar's extensive powers, including on the topic of disciplinary proceedings.<sup>86</sup>

---

81. *Id.*

82. This committee followed a preceding committee appointed by Minister of Justice David Libai in October 1993 and headed by retired Supreme Court Justice Yaakov Maltz, which looked only partially into the bar's disciplinary proceedings but commented on their low prestige and problematic status. COMPTROLLER, DUH 'AL HABIKORET BELISHKAT 'ORKHE HADIN BEYISRAEL [REPORT ON THE REVIEW OF THE ISRAEL BAR ASSOCIATION] (1999) (Isr.) [hereinafter COMPTROLLER REPORT ON THE ISRAEL BAR ASSOCIATION], available at <http://80.70.129.40/docs/lawyers.rtf>.

83. HCJ 1302/96 *Indep. & Change Faction v. Tel Aviv Reg'l Council of the Bar Ass'n* [1996] IsrSC 50(3) 749. Chief Justice Aharon Barak commented,

The Central Committee [of the bar] is the prosecutor before the disciplinary court. Is it proper that the prosecutor will, de facto, determine the membership of the disciplinary court in its district? The regional committee reflects the internal politics of the bar. Is it not appropriate that choosing the judges should be excluded from such politics? It seems that there is place to consider changing the law, in a manner that the judges in the disciplinary court will be elected by an appointment committee, similar to election of justices and (religious court) judges. The committee will consider the qualification of each candidate, and will surely appoint the best. The election of judges will be taken away from the "political" struggles of the bar and from the local "politics" of the region.

*Id.* at 757.

84. COMPTROLLER REPORT ON THE ISRAEL BAR ASSOCIATION, *supra* note 82, at 17–23.

85. KNESSET DISCIPLINARY REVIEW DOCUMENT, *supra* note 75.

86. *See, e.g.,* Salzberger, *supra* note 30; Zer-Guttman, *supra* note 32; Ziv, *supra* note 30.



At first, the bar tried to halt and defy this wave of challenges to its well-entrenched practices and privileges. It managed to stall legislative reforms for some years, advocating within the MOJ and aligning support among lawyer Knesset members who had held positions in the bar association beforehand. Around 2002, the MOJ started to take the lead on furthering the legislative reform, focusing on disciplinary hearings. The MOJ gradually became the main opposition to the bar. Amendment Number 32 to the Israel Bar Association Act turned into a government-supported bill, led by jurists within the MOJ's legislative department.

This move constituted a stark change in the MOJ's policy compared to its past convention, which had been passive and weak in challenging the bar's extensive powers. It soon became clear to the bar that the organization had lost the ability to stop legislative reform altogether. The bar encountered strong and persistent challenges from government officials, who exhibited a distrustful attitude toward the bar, openly doubting its proclaimed motivations as a guardian of the public interest, rather than its own. Therefore, the bar set its mind on securing the best arrangement possible under the new emerging political and legislative order.

Amendment Number 31 to the IBA Act was submitted to the Knesset in 2004.<sup>87</sup> It took three more years for the bill to come before the legislature again, following a series of negotiations between the MOJ and the bar.<sup>88</sup> When the bill reached final deliberations in the Knesset Constitution, Law, and Justice Committee (CLJC), the parameters of the reform had already been agreed upon. On the one hand, the grand move of legislative intervention in an arrangement that had been in place for almost forty years was no longer contested. On the other hand, it was also settled that overall disciplinary proceedings would remain within the bar's jurisdiction and would not be turned over to external bodies. In this sense, the bar managed to preserve a significant part of its power over policing lawyers but had to give up exclusivity and control at a number of crucial junctions.

In the fall of 2008, the Knesset CLJC renewed its hearings on the bill in preparation for its final reading. In the next part, I analyze these deliberations, which exemplify the struggle over control and turf between the Knesset, the state (MOJ), and the bar. As illustrated below, one cannot identify a stable or apparent alliance among these bodies: at times the Knesset members exhibited strong support for the government's position, expressing concern over the vast powers afforded to the bar; in other instances Knesset members sided with the bar, understanding its worries over extensive government control over the legal profession. Obviously the

---

87. Amendment to the Israel Bar Association Act (no. 31), 2004, S.H. 745 (Isr.).

88. Deputy Attorney General Joshua Schoffman explained during the first hearing of the bill in the Knesset Constitution, Law, and Justice Committee (CLJC) that the delay was caused due to attempts of the Ministry of Justice (MOJ) to reach an agreement with the bar. He described the bill as a version that overall had earned the support of the bar, which at that point did not object to a legislative reform but differed in its content and details. Protocol 328 of the Knesset Constitution, Law, and Justice Committee (Nov. 4, 2007) (Isr.) [hereinafter Protocol 328].

judiciary was not present in this process, but as the bill included (at some point in time) a designated role for the Chief Justice of the Supreme Court, the politics of the court, described above, found their way into discussions on the bar's jurisdiction.

As expected, the final version of the law, which was legislated in June 2008, struck a balance between these competing interests and viewpoints. It can be argued that the bar's accomplishments are far greater than the public interest demands. On the other hand, the process per se seems to be an important precedent: a comprehensive reform forced upon the bar from the outside.<sup>89</sup> My analysis examines the discourse during the legislative deliberations in order to point out the means by which this new balance was achieved. The following are a number of issues that drew heated debates during the disciplinary proceeding hearings of the Knesset CLJC.

#### A. *Establishment of a Nominating Committee for Disciplinary Judges*

All sides agreed that the current arrangement under which judges are appointed to the disciplinary board is flawed, and that a nominating committee (NC) ought to appoint judges to the district national disciplinary boards. There were harsh disagreements, however, on numerous basic questions relating to this committee, chief among them the following:

- Who will chair the NC?<sup>90</sup>
- Who will appoint the Chair of the NC?<sup>91</sup>
- Who will appoint the Chair of the disciplinary bench?<sup>92</sup>

---

89. The bar's chair of the Ethics Committee, attorney Dror Arad Ayalon, described the amendment as "important," underscoring the fact that the bar did retain most of the control over disciplinary proceedings. Dror Arad Ayalon, *Hareformah Bedin Hamashm'ati [The Reform in the Disciplinary Law]*, ETTIKA MIKTSU'IT, July 2008, at 1, 1–2.

90. The bar itself asked that the chair of the Nominating Committee (NC) be chosen from the existing judges of the disciplinary boards, a position objected to by the MOJ and rejected by the Knesset due to the majority of bar representatives in the NC. Protocol 328, *supra* note 88, at 4, 8. The Knesset preferred a retired justice, preferably a retired Supreme Court justice. *Id.* at 21–22. The arrangement adopted designated either a retired Supreme Court justice or a retired president of a District Court Justice to chair the NC. Amendment to the Israel Bar Association Act (no. 32), 2008, S.H. 597 § 18D(a)(1) (Isr.).

91. The MOJ asked for this position to be held by the MOJ, but the bar objected strongly. Protocol 328, *supra* note 88, at 6 (attorney Mozer expressing concern over the "taking over" of the process by "the state"). The Knesset members suggested that the Chief Justice hold this position. The final decision gave this power to the Minister of Justice, in consultation with the head of the bar association. 2008, S.H. 597 § 18D(a)(1).

92. The bar wanted the District Disciplinary Court to choose its own president and the Central Committee of the bar to appoint the president of the National Disciplinary Court; the MOJ objected, asking that the presidents be appointed by the NC. Protocol 340 of the Knesset Constitution, Law, and Justice Committee 44–47 (Nov. 14, 2007) (Isr.) [hereinafter Protocol 340]; Protocol 567 of the Knesset Constitution, Law, and Justice Committee 5 (June 15, 2008) (Isr.) [hereinafter Protocol 567]. The final arrangement gave the power to the judges, with the approval of the NC. 2008, S.H. 596 § 18D(a)(1).

- What percentage of the membership of the NC will be appointed by the bar?<sup>93</sup>
- Will the state have a designated number of members that it can appoint to the NC from within the civil service?<sup>94</sup>
- Will the NC need a special majority for its decisions?<sup>95</sup>

Analyzing the discussions on these matters reveals a political struggle on the boundaries of the bar's autonomy, as well as the extent of external control over the central change introduced by the bill—taking away the exclusive power to appoint judges from the bar. Although the bar agreed to the principle of change, it wanted to preserve as much control as possible in the new deal.

### B. *Establishment of Statutory Ethics Committees*

Another central change proposed by the bill was the establishment of statutory regional and national ethics committees. These committees would be vested with prosecutorial powers to bring disciplinary charges against lawyers, as well as to issue prerulings upon request. The membership on these committees drew heated debates on the following points:

- Will nonlawyers serve on the ethics committees?<sup>96</sup>
- Will jurists who are not practicing lawyers be allowed to serve on the ethics committees?<sup>97</sup>
- Will there be a paid position to coordinate and implement the work of the ethics committees?<sup>98</sup>

93. Before the hearings it was agreed that the bar would appoint four out of seven members of the NC. 2008, S.H. 598 § 18D(a)(3)–(4).

94. The bar strongly objected to having “designated” members, chosen by the civil service, fearing they would form opposition with the members of the bar. The position of the MOJ was adopted. *Id.* § 18D(a)(2).

95. The MOJ's request for a special majority (five out of seven) was not accepted. Protocol 340, *supra* note 92, at 22. The bar stated that there was a “trade-off”: the MOJ's position was accepted as a reappointment of the NC chair, therefore the MOJ should prevail on the special majority request. *Id.* at 21–22.

96. The bar strongly objected to the possibility that nonlawyers would staff the ethics committees, and its position was accepted.

97. The bar also strongly objected to nonactive members of the bar (such as retired judges, members of academia, jurists from civil service, etc.) serving on the ethics committee. The debate on this point was long and principled. The bar's position was rejected, and the arrangement adopted allowed a number of nonactive members of the bar to serve on these committees. Protocol 401 of the Knesset Constitution, Law, and Justice Committee 16 (Jan. 1, 2008) (Isr.) [hereinafter Protocol 401].

98. The bar objected to establishing this paid position; its position was not accepted. 2008, S.H. 597 § 18C; Protocol 476 of the Knesset Constitution, Law, and Justice Committee 1–18, 35–45 (Feb. 26, 2008) (Isr.) [hereinafter Protocol 476]; Protocol 416 of the Knesset Constitution, Law, and Justice Committee 35–45 (Jan. 9, 2008) (Isr.) [hereinafter Protocol 416].

The debate over the ethics committees' authority was extremely lengthy. It touched upon the core issue at stake: Who will control the determination of normative ethical and behavioral standards of lawyers, through bringing charges as well as through a preruling procedure? The Chair of the CLJC, Member of the Knesset (MK) Ben Sasson, who generally took a strong stand against the anticompetitive position of the bar, expressed his sentiments on this question: "I know of no other public organization in Israel that has a statutory status similar to the bar. The public gave you this status, the public must be a participant. The public makes your law, backs you up, let the public sit there."<sup>99</sup>

In general, the bar attempted to keep the shop closed as much as possible for its membership. It not only objected to appointment of nonlawyers to the ethics committees but also to jurists who were not active members of the bar, such as retired judges, or in civil service. On this point, the bar's position was rejected and the MOJ's accepted. The Knesset turned down, however, the MOJ's request to designate a quota for public service and state lawyers on the ethics committees, drawing critique from MK Itshak Levi, stating that "[r]epresentatives of the state have no advantage on issues of ethics."<sup>100</sup> As for the proposal to appoint a lawyer in a paid position to coordinate and implement the work of the ethics committees, the bar objected to this new position, arguing for the professional interests of participation and democracy. The bar's proclaimed concern was that the disciplinary proceedings would become too formal and professionalized, losing their collegial, informal nature. The MOJ, whose position was accepted on this point, wanted the exact opposite: more professionalized, standardized, and transparent proceedings.

### C. Abolishment of Procedural Privileges

The arrangements that afforded lawyers exceptional privileges throughout disciplinary proceedings were for the most part abolished. The bill established that the proceedings would be held in open court and that punitive measures (expulsion and suspension) would apply immediately unless stayed by a court order. In addition, appeal to the Supreme Court on rulings of the disciplinary courts was replaced with a review by a district court, as is commonly the norm in similar procedures.

On its own, the legislative amendment on disciplinary proceedings did not overturn the system fundamentally, because it left them, in large part, within the domain of the bar. Nevertheless, it should be assessed as part of a proactive and critical standpoint emerging from the government and the Knesset, signaling a current change in their relative powers. This approach treats dubiously lawyers' claims for professional independence and entrusts lawyers with societal obligations, thus accentuating the public rather than private nature of the profession.

---

99. Protocol 401, *supra* note 97, at 17.

100. *Id.* at 23 (statement of Member of the Knesset Itshak Levi).

## V. OBLIGATIONS TOWARD NONREPRESENTED THIRD PARTIES

The private-public tension embodied in lawyers' ethos is manifested in an inherent professional "loyalty intersection." Lawyers simultaneously carry multiple obligations to their clients, to the court, to the profession, to fellow colleagues, to opposing parties, to their employers, to their own personal interests and beliefs, and to the public at-large. They need to constantly balance these duties, a task that is complicated due to frequent discord between different interests. The body that determines how to balance out these competing interests operates therefore as a regulator, by setting the array of rights and rules by which lawyers must carry out this task.

Regulation of this sort can be conducted through different venues: direct legislation (for example reporting duties),<sup>101</sup> ethical rules (for example bar disciplinary procedures), administrative and intuitional controls,<sup>102</sup> or liability rules.<sup>103</sup>

Liability rules operate on the basis of ex post complaints and lawsuits (usually for monetary damages) filed against lawyers by injured parties. The large part of them are malpractice law suits of injured clients; it is through cases of this sort that courts define professional competency and set lawyers' standards of practice.<sup>104</sup>

But liability claims are not limited to clients and are often launched by nonclient third parties who have been harmed either by a client who was represented by a lawyer now being sued, or by the lawyer directly. In these cases, courts are called upon to define the scope of lawyers' professional duties toward third parties, oftentimes when these duties stand in direct conflict with the lawyer's primary duty to further the interests of his or her own client.

Cases of this sort, in particular those in which a client's conduct has injured third parties, reveal the broader dispute about the extent to which lawyers should play a role in controlling socially undesirable behavior of their clients. This is a fundamental question that lies at the heart of the

---

101. See Shelley D. Gatlin, Note, *Attorney Liability Under Deceptive Trade Practices Acts*, 15 REV. LITIG. 397, 400 n.9 (1996); see also Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 784 (codified as amended in scattered sections of 15 and 18 U.S.C.); 15 U.S.C. § 7245 (2006).

102. See Fred C. Zacharias, *Understanding Recent Trends in Federal Regulation of Lawyers*, 2003 PROF. LAW. (SYMPOSIUM ISSUE) 15, 16–22.

103. See Wilkins, *supra* note 13, at 806–07; Fred C. Zacharias & Bruce A. Green, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L.J. (forthcoming Spring 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1324206](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1324206).

104. As most lawyers carry malpractice insurance, insurance companies are playing a growing role in setting professional standards as well. In Israel, the courts have been elevating lawyers' standard of behavior toward their clients and demanding a heightened level of competence, particularly in land transactions. See, e.g., CC (TA) 2184/99 Sharon v. Leibovitz (1998) 6408 (3) 2002 (Isr.) (Hayut, J.) (imposing civil liability upon a lawyer for drafting a contract that did not protect sufficiently the clients who were purchasing an apartment).

debate about lawyers' ethics.<sup>105</sup> Is the lawyer simply the "long arm" of the client, and therefore not accountable to the consequences of the client's act as long she remains "within the bounds of law"? Or do we expect the lawyer to bear a heightened standard of behavior when third parties might be harmed and to use measures to protect them? That lawyers owe some direct duties to third parties—at times on account of their clients' interests—reflects the notion that lawyers are not only officers of the court in the narrow sense of this term, but that we expect them to exhibit higher standards of morality as part of their role in the justice system at-large.<sup>106</sup> In other words, as the courts in Israel determine lawyers' liability in these circumstances, they are in fact transforming the theoretical and moral debate about professional accountability into binding legal standards. Examining civil suits (rather than disciplinary processes) addressing lawyers' liability toward third parties is informative because negligent professional conduct does not necessarily constitute a disciplinary or ethical offense.

In Israel, courts have dealt with questions of liability toward third parties in a broad array of circumstances.<sup>107</sup> They have imposed civil liability upon lawyers when lawyers established a direct relationship with nonclients, when they undertook to carry out a task benefiting a nonclient, when the lawyer provided a service to a person who had relied upon the lawyer, and when the lawyer misrepresented himself as having a duty toward the affected person.<sup>108</sup> In cases of this sort, the courts imposed a duty, which previously had not been recognized, toward an affected party beyond the strict lawyer-client relationship, finding lawyers liable for the damages caused by their acts. The courts have thus regulated the profession by setting a normative behavioral standard upon the lawyer, *qua* lawyer, even if the same activity did not constitute an ethical offense.<sup>109</sup> However in most cases of this sort there had not been a direct conflict between the interest of a client and an affected third party.

The Israeli courts have taken the duty to nonclients a step further. In a number of cases litigated in the last decade, the courts were asked to recognize the civil liability of lawyers for monetary damages caused to an unrepresented, opposing party as a result of a legal transaction in which the

---

105. See, e.g., FREEDMAN, *supra* note 26; LUBAN, *supra* note 25; Gordon, *supra* note 25; Murray L. Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RES. J. 543; Simon, *supra* note 25; Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 12 (1975).

106. See LUBAN, *supra* note 25, at 166–69. David Luban claims that lawyers must act as moral buffers between their clients and potentially injured third parties. *Id.*; see also Zacharias, *supra* note 20, at 3–5, 7 (summarizing argument for lawyers' adoption of an ethical stance based on "universally applicable morality").

107. The most comprehensive research on this topic has been conducted by Limor Zer-Guttman. See generally Zer-Guttman, *supra* note 15; Zer-Guttman, *supra* note 32.

108. Zer-Guttman, *supra* note 15, at 172–83.

109. See John H. Bauman, *A Sense of Duty: Regulation of Lawyer Responsibility to Third Parties by the Tort System*, 37 S. TEX. L. REV. 995, 1012–17 (1996). The basic liability of lawyers toward third parties was established in *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958).

lawyer had represented a client.<sup>110</sup> In all cases, the legal transaction involved either the purchase of a home or some other transaction of real property by the nonclient, and, in all cases, the lawyer had represented the developer, the contractor, or a lender. The legal documents governing the transaction were drawn up by the lawyer, who looked after the interests of his clients alone and did not adequately protect the interests of the opposing, weaker party. As a result of these unbalanced deals, the third parties lost assets and sued the lawyers for their damages. The lawyers claimed that they owed fiduciary duties and a duty of care to their clients only and thus could not be held liable for the damages that occurred to opposing parties. They further argued that, if the court recognized their liability to protect the interests of nonclients, this would entail a breach of their duties to their clients.

In two recent cases, the Israeli Supreme Court rejected these arguments. Instead, the court inquired into the actual relationships that evolved between those involved in the transaction. The judges examined the power disparities between the parties; the type of transaction that was at stake (acquisition of a personal home or a mortgage of a small business); the extent of the lawyer's involvement in setting up the legal transaction; the way the lawyer had presented herself during the deal; the level of trust that was actually bestowed upon the lawyer by the third party; how foreseeable the damage had been at the time of the transaction; and, in general, the "fairness" of the event. It recognized that lawyers have duties of care toward nonclients in circumstances of severe imbalance of power between parties, deep lawyer involvement in the transaction, actual reliance upon the lawyer by the nonrepresented party, and when that party was not advised by the lawyer to consult or hire an independent lawyer.<sup>111</sup> The Court further ruled that in order to fulfill this duty the lawyer may be expected to take legal measures to protect the opposing party, even if it might be disadvantageous for the client.

*Nahum v. Durnbaum* is a particularly telling case.<sup>112</sup> In this instance, a lawyer represented a lender in a complicated legal transaction in which the opposing party, a couple who urgently needed a loan, agreed to draconian borrowing terms and to the imposition of a lien on their home as security for the loan (the transaction included excessive interest rates, severe penalties for nonpayment, and harsh terms of immediate foreclosure). The borrowers were not represented during the legal transaction and the lawyer did not advise them that they ought to consult with a lawyer on their part. As expected, the loan was not repaid according to its terms, and the family lost its home and acquired additional heavy monetary losses. The lawyer

---

110. *E.g.*, CA 2625/02 *Nahum v. Durnbaum* [2004] IsrSC 58(3) 385; CA 6645/00 *Arad v. Even* [2002] IsrSC 56(5) 365; CA 1170/91 *Bekhor v. Yehiell* [1994] IsrSC 48(3) 207; CA 751/89 *Mushapor v. Shohat* [1992] IsrSC 46(4) 531; CA 37/86 *Levy v. Sherman* [1990] IsrSC 44(4) 446.

111. *See Arad*, IsrSC 56(5) *passim*; *Nahum*, IsrSC 58(3) *passim*.

112. *Nahum*, IsrSC 58(3) at 385.

who represented the lender was found to have violated his duties of care toward the nonclient borrowers. The court determined that he acted negligently toward them and was thus liable for part of the damages suffered. Chief Justice Barak noted that the lawyer should have devised the transaction differently, in a way that would guarantee more protection to the borrowers, protection that contract law itself affords in land transactions of this sort. At the least, stated Chief Justice Barak, the lawyer should have notified the borrowers that they were entitled to certain protections by law, since they were mortgaging their personal home, and he should have advised them not to sign the mortgage contract before they received all the money. By not doing so, the lawyer violated his direct duty toward the nonclient, notwithstanding the disadvantage this may have caused his client.<sup>113</sup>

The notable point in this case is that the borrowers filed suit against the lender, but lost the case on contractual grounds. The civil court held that the contract could not be invalidated on legal grounds of undue duress or coercion. In other words, the client-lender had acted "within the bounds of law"; nevertheless, the lawyer was held to a different, elevated standard of behavior. By recognizing a direct duty of the lawyer to the nonclient borrower, and by holding the lawyer to a higher normative standard than his client, the court struck a balance between client interests and inferiorly situated, nonrepresented third parties who put faith in the lawyer. In the words of Chief Justice Barak,

The deal the lawyer had cooked up created a complex legal situation. The understanding of this situation requires knowledge in the law . . . . Of course, due to the legal complexity of the transaction[,] the appellate, as a lawyer, enjoys a significant advantage of knowledge and control. The respondents, on the other hand, were at an inferior position and they trusted the legal talents of the [lawyer]. They trusted his integrity, skills and honesty.<sup>114</sup>

Through the definition of negligence, the court gave meaning to the public role of the lawyer: the lawyer could not claim that he satisfied his professional duties by utilizing all of the means the "law" made available to his client. As a lawyer, the expectation was that he perform his duties not only by following the letter of the law, but also by adhering to its spirit and purpose. It is highly probable that in this kind of situation, the bar was unlikely to regard the lawyer's behavior as unethical, according to existing disciplinary standards.

This judicial outcome was not unanticipated. In general, the courts are inclined to consider lawyers' duties toward the court (and thus, the public) as trumping their duties to their clients when those are in conflict. More than once, the Israeli Supreme Court has stated that during adjudication,

---

113. *Id.* at 428–29.

114. *Id.* at 426–27.



lawyers' duties to clients ought to cede those owed to the judiciary.<sup>115</sup> *Nahum v. Durnbaum* thus can be seen as an extension of this viewpoint into transactional practice. By setting this standard, the court redefined the public/private boundaries of lawyers' duties.

#### CONCLUSION

Since the 1990s, the legal profession has been subjected to increased regulation from multiple, external sources. This regulatory transformation is not occurring through comprehensive reforms like those that took place in the United Kingdom and New Zealand in the last decades. The change occurs through piecemeal, small-scale, incremental encroachment on the previously tight system of self-regulation.

When state institutions begin setting lawyers' terms of practice, they bring along a particular vision of the legal profession's role in an open society. This vision does not adhere to the strong version of client loyalty. It weakens lawyers' self-interests and attempts to impose broader public commitments upon the profession. In this essay, I have described in detail two newly established arrangements of this sort, but there are many others. State agencies now see lawyers as gatekeepers of the public good and require them to heighten their reporting duties. The legislature demands that they open up the profession to greater transparency, accountability, and competition (uncoincidentally, all characteristic of a functioning democracy). Judges have begun to impose direct sanctions on lawyers who do not assist the court to administer what they define as justice. Courts have begun to intervene more often in fee agreements between clients and lawyers, with a view toward greater protections of clients' interests. Courts are setting higher standards in civil malpractice suits. This judicial intervention may not reveal a coherent and well-developed standpoint about lawyers' societal roles, but it does signal a change. The anticompetitive, protective, and self-interested nature of the profession can not and should not be sustained any longer.

Alongside state regulation, competition is also challenging the bar's entrenched control over the market for legal services. To begin with, commercial companies and nonprofit organizations are entering the terrain in which lawyers had dominated exclusively. What used to be a rather quiet front in the early decades of Israeli statehood now requires constant maintenance and monitoring from the bar, which has been losing the stronghold in determining who can provide legal services. From a different front, as the number of malpractice suits increase, insurance companies are playing a larger part in setting lawyers' standards of competence and professionalism.

To be sure, this type of market-originated, indirect regulation is hardly interested in defining a public role for lawyers and is mostly driven by

---

115. See, e.g., CA 6185/00 Hana v. State of Isr. [2001] IsrSC 56(1) 366; CrimA 196/97 Martinez v. State of Isr. [1997] IsrSC 50(5) 591.

profit making. Nonetheless, due to these changes, the organized bar needs to compete for clients and consumers by persuading the public that lawyers are more than just profit maximizers, and that they carry an added value to their professionalism.

The profession now depends on multiple external bodies to control its terms of practice, instead of one unified body as was in the past. Given the stratification of the bar and the diverse professional ideologies from within, it has become more difficult for lawyers to resist change by forming a united professional front to counter the new regulators and the interests they represent.

It is within this framework that the private-public tension embodied within the legal profession is being redefined. The bar from within, and the new regulators from outside, will determine together how Israeli lawyers will fuse their private commitments and public ideals.