

Judicial Independence and the Supervision of Judges' Conduct:

Reflections on the Purposes of the Ombudsman for Complaints against Judges Law, 2002

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Preface

This article deals with the Judges Ombudsman's Office (hereafter – the Ombudsman's Office), which began operations in Israel on 1 October 2003 pursuant to the Ombudsman for Complaints against Judges Law, 2002. The article contains four principal sections: Section 1 provides the background of the establishment of the Ombudsman's Office, and discusses the situation that prevailed prior to enactment of the law; Section 2 discusses judicial independence, its meaning, and its importance; Section 3 deals with accountability, its meaning and importance, and its relationship to judicial

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independence; and Section 4, which discusses the establishment and aims of the Judges Ombudsman's Office.

The contention common to each of these sections is that the status of the Ombudsman's Office, its purposes, and the scope of its powers must be understood against the background of two relevant cardinal principles: judicial independence and accountability. In its activity, the Ombudsman's Office deals with these two principles in a way that properly achieves each, with one complementing the other.

Section 1: Background of the Establishment of the Judges Ombudsman's Office

Prior to establishment of the Ombudsman's Office, Israel had no special external statutory body to review and supervise the conduct of judges in carrying out their function, including their handling of trials (hereafter – judicial conduct and administration). There was incidental and non-institutionalized supervision by certain entities, using various means, some informal and part of the judicial system itself. These means included the

following: the directives set forth in the Rules of Judicial Ethics, 1992;¹ disciplinary proceedings held in the Disciplinary Court;² the case law of the Supreme Court sitting as an appellate court or as the High Court of Justice, in the Court's decisions that relate to these aspects of judicial activity,³ and decisions of the Judicial Ethics' Committee, whose function is to direct judges prior to the doing of a certain act, where a query has been submitted by a judge.⁴

In addition to the above, specific complaints regarding judicial conduct or administration were submitted to a number of persons and entities, among

¹ See Crim. App. 1182/99, *Horowitz v. State of Israel*, PD 54 (2) 49; HCJ 1622/00, *Yitzhak v. President Barak*, PD 54 (2) 54; Ben Dror, "How are Rules for Judicial Conduct Set?," 8 *Hamishpat* 405 (2003). The article deals with the rules that set criteria for judicial conduct in various judicial systems.

² Section 13 of the Basic Law: The Judiciary. See Disc. Ct. 2/88, *Minister of Justice v. Judge Asher Ben Yitzhak Arbel*, PD 42 (3) 63; Disc. Ct. 3/88, *Minister of Justice v. Judge Harifai*, PD 42 (3) 69; S. Sheetret, *On the Judiciary*, 312-313 (2004) [in Hebrew].

³ See S. Sheetret, *On the Judiciary*, 308-311 (2004). See, also, for example, HCJ 188/96, *Gad Tzirinski v. Vice-President of the Hadera Magistrate's Court, Judge Amiram Sharon*, PD 52 (3) 721, 743-744; HCJ 6972/96, *The Movement for Quality Government v. The Attorney General – Michael Ben Yair*, PD 51 (2) 757, 782; HCJ 3101/96, *Ya'akov Rozen, Attorney v. Raphael Tal, Dinim Elyon* 52 678. Comments on the proper judicial conduct and administration have appeared more than once in appeals relating to the disqualification of judges. See, for example, Crim. App./ 1988/94, *Danny Brown v. State of Israel*, PD 48 (3) 603, 633-634. In this matter, see also H. Ben Nun, "Disqualification of Judges": *The Civil Appeal* (Second Edition, 2004) [in Hebrew].

⁴ Regarding the different mechanisms of reviewing the acts of judges, including public review by the Knesset, the media, and pressure groups, see, S. Sheetret, "Accountability of Judges," *Justice in Israel: A Study of the Israeli Judiciary*, 290-306 (1994); *Functioning of Judges: Reviewing and Assessment* 29-31 (comments of President Barak) [in Hebrew]. These two sources relate also to methods of supervising within the judicial system.

them the president of the Supreme Court, the presidents of the lower courts, the courts' administrator, the minister of justice,⁵ the Knesset or a Knesset committee, Knesset members, the president of the state, and others. It should be noted that the ombudsman in the State Comptroller's Office was not empowered to handle complaints against judges, except in a very limited manner that did not enable the ombudsman to become a focal point for such complaints.⁶

The scope of the complaints, as published in documents prior to enactment of the law, and the lack of uniformity in the handling of complaints and in the manner of dealing with a judge whose conduct and trial administration did not meet proper judicial standards led to the consideration of statutory change.⁷ Those involved in this matter – legislators, judges, jurists,

⁵ See Report of the Committee for the Rules for the Selection of Judges, Appendix 1 (2001).

⁶ Knesset Record 293 (12 March 2002), pp. 253-254, 257. On the ombudsman in the State Comptroller's Office, see <http://www.mevaker.gov.il/serve/site/comptroller.asp>. On the uniqueness of the institution of the general ombudsman in Israel, primarily regarding its connection with the State Comptroller, see A. Goldberg, "The Ombudsman's Office – Principles and their Implementation," 59 *Studies in State Auditing* 9 (2002) [in Hebrew].

⁷ Regarding such improper acts, see Knesset Record 293 (12 March 2002), pp. 254-255; Hearings of the Knesset's Constitution, Law and Justice Committee 496 (26 June 2002), p. 7; Report of the Committee for the Rules for the Selection of Judges, Appendix 1 (2001).

and academics – have dealt with questions related to supervising judges, the most important being: Is an external review of judges advisable and required?⁸

Section 2: The Principle of Judicial Independence

The question of the need for external review of judges is entwined with the principle of judicial independence, which is a vital element of the judiciary's activity. Judicial independence means that the judge may adjudicate freely, without outside influence, pressure, or incentives, without fear, without bias, with the judge being subject only to the law, while acting in accord with his professional discretion, sense of justice, and conscience. The ethical roots of judicial independence can be found, *inter alia*, in Jewish tradition, in which the judges of Israel were commanded as follows: "Hear the causes between your brethren, and judge righteously between every man and his brother, and the stranger that is with him. Ye shall not respect persons in judgment; but ye shall hear the small as well as the great; ye shall not be afraid of the face of man."⁹

⁸ Among the persons involved, special mention should be made of Supreme Court President Aharon Barak and the Courts Administrator at the time, President (as his title was at the time) Dan Arbel.

⁹ Deuteronomy 1:16-17.

It is customary to distinguish between two primary components of judicial independence: the independence of the individual judge, meaning his lack of dependence on irrelevant external factors, and institutional independence, the independence of the judicial authority as an entity.¹⁰ The judicial independence of the individual judge also has two aspects. One aspect is substantive independence, which is protected in Section 2 of the Basic Law: The Judiciary, whereby, “A person vested with judicial power shall not, in judicial matters, be subject to any authority but that of the Law.”¹¹ The second aspect is personal independence, which is protected by rules that set forth the manner of the appointment and conditions of service of judges,¹² and prevent improper interference with judges, and by rules and principles stated in other areas, such as judges’ immunity in tort for a judicial act taken in carrying out the judicial function,¹³ rules regarding certification of judges,¹⁴ and the rule of

¹⁰ L. Ralph Mecham, “Introduction to Mercer Law Review Symposium on Federal Judicial Independence,” 46 *Mercer L. Rev.* 638 (1994-1995).

¹¹ See also Section 12 of the Religious Court Judges Law, 5716 – 1955; Section 184 of the Military Justice Law, 5715 – 1955; Section 9 of the Qadim [Muslim Religious Court Judges] Law, 5721 – 1961; Section 15 of the Druse Religious Courts Law, 5723 – 1962; Section A(6) of the Rules of Judicial Ethics, 5752 – 1993.

¹² Sections 4, 7, and 10 of the Basic Law: The Judiciary.

¹³ Section 8 of the Civil Wrongs Ordinance (New Version), 5728 – 1968. See Civ. App. 2315 (Jerusalem), *State of Israel v. Avi Friedman, Dinim Mehozi* 32 (7) 621. The judgment examines the question of the liability in agency of the state for the negligence of a judge. Some commentators think that the judgment gnaws away at

sub-judice.¹⁵ Institutional independence is an expression of the principle of the separation of powers, and is viewed as a requisite condition for the independence of the individual judge.¹⁶ Protection of this independence is included in the creation of administrative and organizational autonomy of the judicial branch¹⁷ (this subject and the theoretical and practical problems it entails will not be discussed in this article).¹⁸

It is hard to exaggerate the importance of judicial independence, in both its personal and the institutional aspects: “Judicial independence is a condition

judicial independence. See also D. Avnieli, “Who will Judge the Judges and When?,” 57 *Hapraklit* 77 (2000); Y. Gilad, “Woe for the Generation whose Judges Need to be Tried?,” 1 *Alei Mishpat* 639 (2000).

¹⁴ See Perm. Civ. App. 3202/03, *State of Israel v. Hagai Yosef et al.*, *Takdin Elyon* 2004 (1) 2063.

¹⁵ Crim. App. 696/81, *Azulai v. State of Israel*, PD 37 (2) 565, 572. See also R. Segev, under the supervision of M. Kremnitzer, *Sub-judice: Restricting Speech to Protect the Propriety and Image of Judicial Proceedings* (2001) [in Hebrew]. But see the changes made to this rule recently in the enactment of Section 71 of the Courts Law (New Version), 5744 – 1984.

¹⁶ HCJ 732/84, *Tzaban v. Minister for Religious Affairs*, PD 40 (4) 141, 147; App. Disq. Cand. 11280/02, *Central Elections Board for the Sixteenth Knesset v. Knesset Member Ahmad Tibi*, PD 47 (4) 1, 23. On the separation of powers, see A. Rubinstein, *The Constitutional Law of the State of Israel* (Second Edition, 1997), Ch. 8, Ch. 9 (1), and p. 334 [in Hebrew]. On the philosophical source of this principle, see M. Shamgar, “Independence of the Judicial System,” *Beit Hamishpat* 230-231 (1999).

¹⁷ A. Barak, *The Judge in Democratic Society* 125-127 (2004) [in Hebrew].

¹⁸ Regarding these problems, see also A. Barak, “The Judicial Authority in Israel – The Constitutional Elements,” *The Judicial Authority: Constitutional Basis, Selection of Judges, Constitutional Elements* 25 (2003) [in Hebrew]; A. Barak, “Toward the Independence of the Judicial Authority” and “Judicial Independence – How,” *Selected Writings* 947, 955 (2000) [in Hebrew]; A. Rubinstein and B. Medina, *The Constitutional Regime of the State of Israel* 35 (1980) [in Hebrew]. S. Sheetret, “The Critical Challenge of Judicial Independence in Israel,” in *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* 233 (2001).

without which the judicial function cannot exist.”¹⁹ “A democratic state that safeguards human rights and the rule of law requires an independent and autonomous judicial branch, as well as the independence of each and every judge.”²⁰ Judicial independence is a central and vital component of every democratic regime. Being an integral part of the principle of separation of powers, it enables the protection of the rule of law, which provides, inter alia, a guarantee of proper administration of the other branches of government, while preventing the misuse or improper use of power by one of them.²¹ Playing a central role in the defense of democracy, it guarantees the preservation of fundamental values and human rights: “The fulfillment of fundamental values, such as equality, liberty, human rights, is only possible in a democratic regime, and a democratic regime is possible only if it has a strong, objective, autonomous, and independent judicial authority, which holds the public's

¹⁹ A. Barak, “On the Judge,” 6 *Hamishpat* 266 (2001).

²⁰ M. Agmon-Gonen, “Judicial Independence? The Internal Threat?,” 9 *Hamishpat* 2 (2004). See also HCJ 732/84, *Tzaban v. Minister for Religious Affairs*, PD 40 (4) 141, 147.

²¹ M. Shamgar, “Independence of the Judicial System as a Fundamental Element of Democratic Order,” 54 *Hapraklit* 245, 249, 254 (1995); A. Barak, *The Judge in Democratic Society* 122 (2004) [in Hebrew]. See also Y. Zemah, *The Judicial Authority in Israel* 78 (1997) [in Hebrew].

confidence.”²² Judicial independence that guarantees objective and neutral adjudication is vital also for doing justice in a suit between two litigants, and in protecting human rights.²³ "Not the identity of the litigants, but the weight of the arguments is that which decides the case."²⁴

Judicial independence is also bound up in the special nature of judicial service.²⁵ Judges do not only provide a service to the citizen in the simple sense. In addition to resolving disputes between two persons and between a person and a governmental authority, judges are involved in delineating the rules applying to the public in general and in setting norms while doing justice in the framework of the law.²⁶ To fulfill the purposes of the judicial system, the judge must be given independence which guarantees that, although its work is done in a pressured, highly emotional atmosphere in which conflicting interests

²² HCJ 506/89, *Yedidiya Bari v. Amira Cochava-Shavti*, PD 44 (1) 604, 610. Judicial independence that guarantees objective and neutral adjudication is vital also for doing justice in a suit between two persons, and also to protect human rights.

²³ S. S. Abrahamson, "Keynote Address: Thorny Issues and Slippery Slopes: Perspectives on Judicial Independence," 64 *Ohio St. L. J.* 6 (2003). M. Agmon-Gonen, "Judicial Independence? The Internal Threat?," 9 *Hamishpat* 2, 15 (2004).

²⁴ HCJ 732/84, *Tzaban v. Minister for Religious Affairs*, PD 40 (4) 141, 148. See also A. Barak, *Interpretation in the Law* 676-677 (1993) [in Hebrew].

²⁵ In the words of President A. Barak, judging "is a mission. Judging is not a job but a way of life" (A. Barak, "On the Judge," 6 *Hamishpat* 269 (2001)).

²⁶ S. Levine, "Judicial Independence – A Look Inwards," 1-2 (not yet published) [in Hebrew].

are involved, his considerations will be objective and that his decisions will be of quality.²⁷

Section 3: Judicial Independence and Accountability

Judicial independence is not absolute, and is not the only relevant element. Another important principle relating to the judicial function is accountability. To the degree that it relates to the judiciary, accountability refers to reviewing the conduct and administration of a judge in carrying out his judicial function, and in the manner in which he conducts trials.²⁸ The review enables supervision of the judge's duty to hear matters in a proper, appropriate, substantive, efficient, and dignified manner, and on his duty to maintain a suitable atmosphere in the courtroom, while ensuring the dignity of the litigants and their counsel, and the dignity of the judicial system and public confidence.²⁹

²⁷ Civ. App. 2315 (Jerusalem), *State of Israel v. Avi Friedman, Dinim Mehozi* 32 (7) 621.

²⁸ S. Sheetret, *On the Judiciary* 307-308 (2004) [in Hebrew].

²⁹ M. Kremnitzer and H. Goldschmidt, "Needed: A Method to Measure, Evaluate, and Review the Judicial System," *Functioning of Judges: Reviewing and Assessment* 14 (2001) [in Hebrew]. See also *Functioning of Judges: Reviewing and Assessment* 29-31 (comments by President Barak); M. Shamgar, "Independence of the Judicial System," *Beit Hamishpat* 231 (1999).

The relationship between judicial independence and accountability has for some time been of interest to scholars and jurists.³⁰ On this issue, there are three principal approaches:

Some commentators are of the opinion that judicial independence must be absolute, with no interference from any external source. They base their contentions on the importance of judicial independence and the (apparently) existing contradiction between judicial independence and any review of a judge's actions.³¹ One expression of this approach is the belief that, independence being absolute, the judicial system itself must handle questions relating to judicial conduct and administration, and that no external reviewing mechanism should be maintained to handle this matter. According to this view, even matters of judicial administration must be handled by and within the judicial system itself.³² This approach is not currently accepted. Today, it is not

³⁰ For a comprehensive survey of the issue in all its aspects, see M. Cappelletti, "Who Watches the Watchmen?: A Comparative Study on Judicial Responsibility," *Judicial Independence: The Contemporary Debate* 550-575 (1985).

³¹ For various expressions of this approach, see M. Cappelletti, "Who Watches the Watchmen?: A Comparative Study on Judicial Responsibility," *Judicial Independence: The Contemporary Debate* 573-574 (1985).

³² See M. Agmon-Gonen, "Judicial Independence? The Internal Threat?," 9 *Hamishpat* 2, 9-13 (2004). See also S. Sheetret, "Normative and Practical Problems in the Administration of the Judicial System," *Compilation of Lectures Given at a Seminar for Judges* 80 (1977) [in Hebrew]; S. Levine, "Judicial Administration and its Goals: Present and Future," *Zusman Book* 279 (1980) [in Hebrew]. These sources relate to the relationship

proper on normative grounds or any other grounds that any public authority review itself, without supervision by some external body.

Others believe that judges, like all public officials, should be subject to supervision.³³ They praise the principle of accountability of governmental bodies and employees. In a properly functioning society, governmental bodies are subject to supervision of their operation which is designed to ensure that officials, as holders of public trust, act in accordance with the law. Indeed, “the public authority is the public’s trustee. It has nothing of its own. Whatever it has, it holds for the public.”³⁴ A public official must serve as an exemplary model, while preserving public confidence in the governmental structure and in its officials.³⁵ Proponents of this approach contend that the accountability of judges is no different than that of other public officials, who are part of the

between justice and efficiency, and tend to present them as conflicting or contradictory values. Thus, they are close to the position taken by Agmon-Gonen.

³³ For a survey of criticism of this approach, see M. Cappelletti, “Who Watches the Watchmen?: A Comparative Study on Judicial Responsibility,” *Judicial Independence: The Contemporary Debate* 570-573 (1985).

³⁴ HCJ 6163/92, *Yoel Eisenberg v. Minister of Construction and Housing*, PD 47 (2) 229, 257. See also HCJ 1635/90, *Tzerz Beiski v. The Prime Minister et al.*, PD 45 (1) 749, 840-844.

³⁵ HCJ 4267/93, *Amitai – Citizens for Proper Administration and Integrity et al. v. The Prime Minister of Israel et al.*, PD 47 (5) 441, 467.

government and provide service to the citizenry.³⁶ This approach does not relate sufficiently to the nature and importance of judicial independence, and to the uniqueness of the service that judges provide to the public.³⁷ This approach is not widespread today.

The third approach offers a middle ground between the two approaches discussed above. It emphasizes the importance of judicial independence and accountability. It reflects the current trend on this issue. Its proponents explain that, as important as it is, judicial independence is not absolute and is not the sole principle applying to judges.³⁸ Judicial independence is a tool, used to protect human rights in litigation, to safeguard the rule of law, and to protect

³⁶ Because of the awareness of the importance of judicial independence, there is little explicit theoretical expression of this approach today. However, it is possible to interpret the questionnaire survey taken by the Israel Bar Association as an expression of this position (see http://www.israelbar.org.il/article_inner.asp?pgId=12604&catId=1811). In addition, one may argue that the structure of the general ombudsman in Sweden and Finland (as explained below, in the next section), which has authority over judges as well as the power to review other state authorities, is reconcilable – if only in part – with this position.

³⁷ An expression of the uniqueness of the judicial function is found, inter alia, in Sections 5, 7, 9-11 of the Basic Law: The Judiciary, and in Sections 5-7A and 11-13 of the Courts Law [Consolidated Version], 5744 – 1984, which set forth conditions for the appointment of judges and arrange the manner of their appointment, conditions for their serving as judges, and for their retirement. One of the ardent spokespersons on the uniqueness of the judicial function is M. Agmon-Gonen. According to her, “Judges are not to be viewed as ‘public servants’ in the ordinary sense.” See M. Agmon-Gonen, “Judicial Independence? The Internal Threat?,” 9 *Hamishpat* 7 (2004), and the references there.

³⁸ Regarding the relativity of fundamental principles in law, see Civ. App. 294/91, *Hevra Kadisha GHSA v. Kastenbaum*, PD 46 (2) 464, 508, 533.

the foundation of democracy, and should be limited where it does not serve these purposes, or even – in extreme cases – harms them.³⁹ It should be remembered that, “a judge is a human being and will so conduct himself.”⁴⁰ As such, he may – specifically if and when his independence is unrestricted – deviate in his conduct and administration from his duty derived from the nature of his function, so as to damage the democratic foundation and the rule of law.⁴¹

The proponents of the third approach do not believe that the two principles are contradictory and cannot be reconciled. For example, S. B. Burbank, professor of judicial administration at the University of Pennsylvania, contends that it is a mistake to think that judicial independence and accountability of judges are in conflict, whereas in fact they complement each other and are to be seen as allies. In his words:

[There is an] erroneous premise, stated or unstated, that judicial independence and judicial accountability are discrete concepts at war with each other, when in fact they are

³⁹ S. B. Burbank, “What Do We Mean by ‘Judicial Independence’?,” 64 *Ohio St. L. J.* 195-201 (2003).

⁴⁰ Civ. App. 2904/92, *Tel-Aviv – Yafo Municipality v. The Estate of the Late Leterhauz*, PD 50 (1) 754, 772 (Justice M. Cheshin). See also A. Barak, “Reviewing the Judiciary,” *Selected Writings* 961 (2000).

⁴¹ F. B. Cross, “Thoughts on Goldilocks and Judicial Independence,” 64 *Ohio St. L. J.* 195-201 (2003).

complementary concepts that can and should be regarded as allies.⁴²

According to this approach, judicial independence and accountability are complementary. Scholars from around the world hold this approach, apparently regardless of the specific kind of judicial system involved.⁴³ In any event, this approach is reflected in Israel in the literature, which adopts it to the Israeli legal system.⁴⁴ According to this approach, a balance of the two principles ensures maximum protection of the right to a fair trial in all its aspects, by which a person is given the opportunity to have his matter heard in a just, fair,

⁴² S. B. Burbank, "What Do We Mean By 'Judicial Independence'?", 64 *Ohio St. L. J.* 325 (2003). See also L. Ralph Mechem, "Introduction to Mercer Law Review Symposium on Federal Judicial Independence," 46 *Mercer L. Rev.* 638-639 (1994-1995); S. Anderson, "Judicial Accountability: Scandinavia, California and the U.S.A.," 28 *Am. J. Comp. L.* 402 (1980).

⁴³ M. Cappelletti, "Who Watches the Watchmen?": A Comparative Study on Judicial Responsibility," *Judicial Independence: The Contemporary Debate* 574-575 (1985). Judge Wallace, former chief judge of the United State's Ninth Circuit Federal Court of Appeals, whom Agmon-Gonen views as finding the principles irreconcilable, calls, in effect, for a "compromise" between the two principles (see J.C. Wallace, "Judicial Administration in a System of Independents: A Tribe with Only Chiefs," 1 *BYU L. Rev.* 39 (1978). Accordingly, the American scholar Bice, a member of the faculty of the University of Southern California Law School, proposes a balance, whereby judicial independence means the freedom of judges from improper control by others, and accountability means proper reviewing of judges. In this way, the principles complement each other, such that the proper reviewing is tested according to the answer to these questions: What entity does the reviewing? How is the supervision done? What degree of interference or supervision is needed? (S. H. Bice, "Judicial Independence and Accountability Symposium: Forward," 72 *S. Cal. L. Rev.* 312-313 (1998-1999).)

⁴⁴ S. Sheetret, *On the Judiciary* 307 (2004) [in Hebrew]; M. Kremnitzer and H. Goldschmidt, "Needed: A Method to Measure, Evaluate, and Review the Judicial System," *Functioning of Judges: Reviewing and Assessment* 14 (2001) [in Hebrew].

proper, quality, dignified, efficient and objective manner, impartially and without bias.⁴⁵ All of these aspects protect the rule of law and strengthen public confidence in the judicial system.⁴⁶ On this issue, Supreme Court's President A. Barak states:

To ensure our role in Israeli society in coming years, we need the public's confidence. Public confidence means confidence in judicial integrity and judicial neutrality at the ethical level of the judge... a feeling by the public that the judicial decision is made fairly, objectively... justice according to law... public confidence does not mean the lack of criticism. On the contrary: criticism is important for every entity holding authority, and is vital for the judiciary. But the criticism must be substantive; it must be based on an understanding of the complexity of the role

⁴⁵ The right to a fair trial appears in Article 16 of the European Convention for the Protection of Human Rights and Fundamental Liberties, and in Article 10 of the Universal Declaration of Human Rights. The importance of this right is also set forth in Israeli law, and some say that it should now be considered a constitutional right derived from human dignity (S. Levine, "The Basic Law: Human Dignity and Liberty and the Rules of Civil Procedure," 42 *Hapraklit* 455 (1996); A. Barak, "Human Dignity as a Constitutional Right," 41 *Hapraklit* 281 (1994)).

⁴⁶ See Perm. Civ. App. 3202/03, *State of Israel v. Hagai Yosef et al.*, *Takdin Elyon* 2004 (1) 2063 (Par. 2 of the judgment).

and the need to preserve the independence of the judicial branch
and the independence of the individual judge.⁴⁷

Section 4: Establishment of the Judges Ombudsman's Office and its Purposes

In enacting the Ombudsman for Complaints against Judges Law, 2002 (hereafter – the Law), the Israeli legislator was aware of the two important principles that had to be considered, and adopted the approach that combines the two.⁴⁸ The Law provides a clear statement of the need and justification for supervising of judges by an external body, and that the review should not be done by the judicial system itself. The review should be carried out with special sensitivity and responsibility, as called for by the principle of judicial independence, which must be steadfastly protected and not impeded. This is not

⁴⁷ A. Barak, "On Norms, Adjudication, and Democracy in Israel," *59 Studies in State Auditing* 25 (2002) (the comments were made at a conference commemorating the thirtieth anniversary of the establishment of the general ombudsman in Israel). See also A. Barak, "Reviewing the Judiciary," *Selected Writings* 961 (2000); M. Kremnitzer and H. Goldschmidt, "Needed: A Method to Measure, Evaluate, and Review the Judicial System," *Functioning of Judges: Reviewing and Assessment* 13-15 (2001).

⁴⁸ Regarding the Law, see also D. Avnieli, "Who will Judge the Judges and When?," *57 Hapraklit* 77, 101-103 (2000).

to say that a judge is held to a lower level of responsibility than that of other public officials. In a certain sense, his responsibility is greater.⁴⁹

The approach that combines the two principles is reflected, *inter alia*, in the explanatory comments to the Draft Law:

The purpose of the Draft Law is to provide every person who thinks he has been injured by an act or omission of a judge, rabbinical court judge, or Muslim Court Qadi, with an address to which he can make his claims... The existence of such an office [ombudsman] is vital for the judicial system, and to the determination that a judge, as an official, is not above the law. The Draft Law contains a balance that is intended to preserve the dignity of the system...⁵⁰

The uniqueness of the Law, which combines judicial independence and accountability, is apparent in a number of ways, among them the following: conditions are set to ensure the exalted status of the ombudsman and to

⁴⁹ It has been held more than once that the level of responsibility demanded of a judge is especially high (HCJ 732/84, *Tzaban v. Minister for Religious Affairs*, PD 40 (4) 141, 148-149; Disc. Ct. 2/88, *Minister of Justice v. Judge Asher Ben Yitzhak Arbel*, PD 42 (3) 63, 66-67).

⁵⁰ P.L. 3085 (4 March 2002), at p. 306. See also Knesset Record 293 (12 March 2002), at pp. 261, 264, 277-278; Hearings of the Knesset's Constitution, Law and Justice Committee 496 (26 June 2002), at p. 12.

recognize the ombudsman as part of the judicial system and his special nature,⁵¹ including the manner in which the ombudsman is chosen (by the Committee for the Appointment of Judges) and the qualifications required for appointment (qualifications needed for appointment as a Supreme Court justice),⁵² in a manner that enables a dignified handling of complaints based on their merits. Also relevant is the distinction made between different elements of judicial activity⁵³ which enables applying external review only on some of them.⁵⁴ The ombudsman does not review substantive judicial decisions. Such review is done

⁵¹ See Hearings of the Knesset's Constitution, Law and Justice Committee 496 (26 June 2002), at pp. 8-10, primarily the remarks of Justice Minister M. Sheerit and the Committee's chairperson, O. Pines-Paz. The issue was also raised in Knesset debates held prior to enactment of the Law. See Knesset Record 335 (24 July 2002), at pp. 207, 209. In these debates, severe criticism was raised that appointment of the ombudsman by the Committee for the Appointment of Judges left the handling of the matter within the judicial system, and thus impaired its credibility. In principle, this contention is baseless, because it is precisely the ombudsman's close acquaintance with the judicial system that enables him (as is the case also with a serving judge) to maintain great objectivity in handling complaints (a matter that has been explained at times in appeals regarding disqualification of a judge). In practice, this contention is refuted in that the Ombudsman's Office's work, which is done objectively, is accepted by the judges with mixed emotions.

⁵² Section 3 of the Law.

⁵³ The distinction and its effects on this issue were discussed by Wallace (J. C. Wallace, "Judicial Administration in a System of Independents: A Tribe with Only Chiefs," 1 *BYU L. Rev.* 39, 55-58 (1978)) and were developed by Bermant and Wheeler (G. Bermant and R. Wheeler, "Federal Judges and the Judicial Branch: Their Independence and Accountability," 46 *Mercer L. Rev.* 835-838 (1994-1995)).

⁵⁴ On the distinction between internal and external review of the judicial system, see P.H. Russell, "Toward a General Theory of Judicial Independence," *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* 1, 11 (2001); S. Sheerit, "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges," *Judicial Independence: The Contemporary Debate* 590, 637, 644-646 (1985).

solely in accordance with the appellate procedures within the judicial system.⁵⁵

The ombudsman's power extends to “the conduct of judges in carrying out their function, including the manner in which they conduct trials.”⁵⁶ Another feature is related to the distinction between the body handling complaints against judges and the body supervising other governmental bodies,⁵⁷ and to the secrecy imposed on the ombudsman and the persons working in the Ombudsman's Office,⁵⁸ in a manner that ensures careful, responsible, and discrete handling,⁵⁹ so as to improve service to the public and correct defects as necessary, while providing optimal judicial independence and public confidence in the judicial system.

⁵⁵ Sections 17 (3)-(5) of the Law.

⁵⁶ Section 2 of the Law.

⁵⁷ The general ombudsman in the State Comptroller's Office.

⁵⁸ Section 13 of the Law, and the provision indicating that the provisions of the Freedom of Information Law do not apply to the Ombudsman's Office “regarding the investigation of a complaint against a judge pursuant to the Ombudsman for Complaints against Judges Law, 2002” (Section 14(a)(12) of the Freedom of Information Law, 5758 – 1998). In this matter, see also the opinion relating to the posting of the judge's response to the complainant on the Ombudsman's Office's Website.

⁵⁹ On the authority inherent in unrestrained public review, see S. Sheetret, “Judicial Independence: New Conceptual Dimensions and Contemporary Challenges,” *Judicial Independence: The Contemporary Debate* 590, 656-657 (1985).

Establishment of the Ombudsman's Office indicates the desire of the Israeli legislator to create a permanent, independent,⁶⁰ neutral, and external institution for the judicial system,⁶¹ one that operates on a daily basis in coordinating the investigation of complaints about judicial conduct and administration in a way that enables the professional and standard handling of the complaints. The Law grants the Ombudsman's Office various means for the handling of defects that have been uncovered in the system and to monitor their rectification, based on the nature and severity of the defect.⁶²

Sources guiding the conduct of justices in carrying out their duties, including the conduct of trials, continue to apply following establishment of the Ombudsman's Office. These sources include the Courts Law [Consolidated Version], 1984;⁶³ the relevant Supreme Court case law; the Rules of Judicial Ethics, 1993, formulated by former Supreme Court's President, Shamgar; other rules of ethics customarily applying in Israel and elsewhere, including unwritten rules; the fundamental principles of our judicial system; the preliminary requirements for judicial appointment, applied by the Committee

⁶⁰ Section 26 of the Law.

⁶¹ Section 29 of the Law.

⁶² Section 22 of the Law.

⁶³ Relevant in this context is Section 77A of the Law, which was recently amended to include an explicit provision regarding the need to refrain from bias.

for the Appointment of Judges; and the scholarly literature and Jewish tradition relating to the characteristics required of a judge. The rules and norms generated by these sources are developed by the Ombudsman's Office and applied to the specific instance of judicial conduct and administration, as appears from investigation of a complaint.

Although some countries, such as Germany, France and England, have no specific arrangement for the handling of complaints against judges, the Israeli legislator did not act in a vacuum. Some western countries have institutions that create a framework for the supervision of judicial conduct and administration in a manner that preserves judicial independence. This supervision does not interfere in the judge's substantive decision-making.⁶⁴ In general, one can point to three primary models on which these institutions are based: One, an Ombudsman, who also handles complaints against judges, a practice that is found, for example, in Sweden and Finland.⁶⁵ The second model

⁶⁴ For a general survey of bodies in the world that handle complaints against judges, see S. Anderson, "Judicial Accountability: Scandinavia, California and the U.S.A.," 28 *Am. J. Comp. L.* 393 (1980). For documents to which the drafters of the Israeli law had access, see Ombudsman – A Comparative Survey (2001), prepared by the International Agreements Division (unpublished); The Proposed Ombudsman for Complaints against Judges (2001), prepared by the Consultation and Legislation Department, Ministry of Justice (unpublished).

⁶⁵ See L. Boim, *The Ombudsman Institution* 1-34 (1975) [in Hebrew]. On the ombudsman in Sweden, see also D. Rowat, "The Ombudsman in Sweden," *The Ombudsman Plan: The Worldwide Spread of an Idea* 3-13 (1985); I. al-Wahab, *The Swedish Institution of Ombudsman: An Instrument of Human Rights* (1979). The information also relies on C. Eklundh, "Supervision of the Courts by the Ombudsman" (written on 27 March

is a special court, composed of judges who are serving as judges on regular courts, which handles matters related to judicial conduct and administration. This arrangement exists, for example, in Denmark and Austria. The third model is a mechanism of control and supervision of judges by a public committee composed of representatives of various sections of the population, and handles complaints against judges, generally in accordance with a code of ethics that the judges accepted. Such a mechanism is found, for example, in California, Arizona, and Canada.⁶⁶

Of the models discussed above, the Ombudsman's Office is most similar to the Scandinavian ombudsman. The similarity is noticeable in the public's wide access to the institution;⁶⁷ not being tied to rules of procedure or evidence

2003, unpublished). On the ombudsman institution in Finland, see also M. Hidén, *The Ombudsman in Finland: The First Fifty Years* (1973); I. Rautio (ed.), *Parliamentary Ombudsman of Finland: 80 Years* (2000), and <http://www.eduskunta.fi>. A general ombudsman who also handles judicial activity exists also in Spain (see D. Rowat, "The Ombudsman Should Supervise the Courts," *Policy Options* 7-8 (1992). For a survey on the development of the ombudsman institution around the world, see M. Oosting, "Roles for the Ombudsman: Past, Present and Future," *Parliamentary Ombudsman of Finland: 80 Years* 17-20 (2000).

⁶⁶ On the committee in Arizona, see www.supreme.state.az.us/ethics/default.htm. On the situation in the United States at the federal level, see L. Shelef, "Removal of Judges and Adjudication of Politicians in the United States," 8 *P'ilim* 345 (1999); S. G. Breyer, "Judicial Independence in the United States," 40 *St. Louis L. J.* 989 (1995-1996).

⁶⁷ The only conditions for submitting a complaint are that the complaint must be submitted in writing, in two copies, and signed by the complainant, setting forth his name and address (Section 15 of the Law; Section 3 of the Judges Ombudsman Regulations, 5764 – 2003). The complaint may be filed by any person who thinks he

in investigating the complaint;⁶⁸ the open approach given to the Ombudsman's Office for information and documents in the hands of persons or entities;⁶⁹ the lack of substantive and personal dependence of the Ombudsman's Office on the judicial authority being reviewed or any other governmental authority;⁷⁰ its activity is ongoing and professional, with the complaints being investigated on a daily basis;⁷¹ the status of its conclusions, which are in principle recommendations and not orders, and their weight deriving from the ombudsman's exalted status; the public's confidence in the Ombudsman's

has been injured as a result of the conduct or administrative act of a judge, by the person's duly authorized representative, or by the president or the minister as defined in Section 1 of the Law (Section 14 of the Law).

⁶⁸ Section 20(a) of the Law. The first two characteristics emphasize the difference between the reviewing powers of the Ombudsman's Office, whether or not it is handling complaints against judges, and the power of courts. On this matter, see A. Goldberg, "The Ombudsman's Office – Principles and their Implementation," 59 *Studies in State Auditing* 9, 10-11 (2002).

⁶⁹ Section 20(b) of the Law.

⁷⁰ In this context, some persons emphasize the special statutory status of the ombudsman (M. Oosting, "Protecting the Integrity and Independence of the Ombudsman Institution: The Worldwide Aspect, 59 *Studies in State Auditing* 67, 69-70 (2002) [in Hebrew]; M. Ben-Porat, "The Ombudsman's Experience in Israel," 56 *Studies in State Auditing* 9, 12, 21 (1997) [in Hebrew].

⁷¹ Section 2 of the Law.

Office⁷² and the finality of the decisions made by the Ombudsman's Office, such that a court will not address applications for relief against them.⁷³

Conclusion

The characteristics of the Ombudsman's Office assist in achieving the combined purpose: improvement of the unique service that judges provide to the public, while protecting their independence. By being an address for any person who thinks he has been injured as a result of a judge's conduct or administration in carrying out his duties,⁷⁴ the Ombudsman's Office serves a social and public function.⁷⁵ The Ombudsman's Office seeks to fulfill the Law's aims by handling individual complaints in a dignified and proper manner, by reaching conclusions that give the complaints extensive effect, by giving recommendations on correcting defects and preventing them from

⁷² Compare, M. Oosting, "Protecting the Integrity and Independence of the Ombudsman Institution: The Worldwide Aspect," 59 *Studies in State Auditing* 67, 70 (2002) [in Hebrew]; M. Ben-Porat, "The Ombudsman's Experience in Israel," 56 *Studies in State Auditing* 9, 14 (1997) [in Hebrew].

⁷³ Section 24(c) of the Law.

⁷⁴ Section 14(a) of the Law.

⁷⁵ In recent years, there has been a lively debate on the role of ombudsman's offices in protecting human rights. See A. Goldberg: "The Ombudsman's Office – Principles and their Implementation," 59 *Studies in State Auditing* 9, 10-12 (2002) [in Hebrew]; D. Cristopolous and P. N. Diamandorus, "The Traditional Mechanisms for Protecting Human Rights Arising from Arbitration in Southeast Europe," 59 *Studies in State Auditing* 49, 56 (2002) [in Hebrew]. See also I. Rautio (ed.), *Parliamentary Ombudsman of Finland: 80 Years* (2000), a compilation of articles on the ombudsman institution in Finland deals in large part with this issue.

recurring, and in monitoring their execution.⁷⁶ In carrying out its tasks, the Ombudsman's Office manages to achieve a combination of judicial independence and accountability, viewing them as complementary objectives.⁷⁷

⁷⁶ On correcting defects following the handling of complaints in general, see M. Oosting, "Roles for the Ombudsman: Past, Present and Future," *Parliamentary Ombudsman of Finland: 80 Years* 17,20-26 (2000).

⁷⁷ The Ombudsman's Office's activity in 2004 is described at length in its annual report, which was issued in March 2005. By law, the report is submitted to the president of the Supreme Court and to the minister of justice., who is empowered to publish parts of the report (Section 27 of the Law). The annual report includes details on the number of complaints filed with the Ombudsman's Office; the number of complaints summarily rejected because they are not subject to investigation or are not subject to investigation without a special reason, and the number of complaints that were substantively investigated, by type of complaint. The report also contains details on the complaints that were found to be justified, the manner in which they were handled, their breakdown by type, and the measures taken to correct the defects that were uncovered. Data on the first six months of the activity of the Ombudsman's Office are published on the Ombudsman's Office's Website. See <http://shoftim.justice.gov.il>.