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Introduction by the State Comptroller and Ombudsman of Israel

In the years since I was chosen to serve as the State Comptroller and Ombudsman of the State of Israel, I have met many people who are involved in the field of auditing. I have also reviewed some articles on the subject of government auditing, in order to investigate further the status of the Office of the State Comptroller and Ombudsman, and the issues that concern this institution in the present era. To my surprise, I found that there is a serious deficiency with regard to research in the field of state audit. I have therefore decided to encourage academic work and research in the field of state auditing, and included in this general encouragement – I have instructed those engaged in this study to reevaluate the influence on the public of the journal put out by our office: the "**Israel Journal of State Audit**". The objective of this assessment is to have this journal become the main platform for the publication of in-depth research in the field of state auditing.

The current issue of this journal, Number 63, constitutes the product of our renewed and comprehensive thinking regarding the status and character of the journal. This issue deals, in depth, with themes relating to the status of the State Comptroller in the public sphere in the State of Israel, from the perspective of both Israeli and international law. This issue of the journal also represents the spirit of the current time, and summarizes my tenure of more than five years – during which I have tried to instill my policies in all areas of the Office' work.

From here, we need only to move forward and strengthen the status of this journal, and to strive to have it continue to serve as a key platform for the publication of quality research and articles in the field of state auditing; I hope that, in the future, this journal will provide a serious basis for studies in this field. For this purpose, we have already issued a request for submissions for the journal's next issue, and I hope that there will be many strong responses.

I would like to thank all those who contributed to the publication of the current issue of this journal. Special thanks to the Legal Advisor to the State Comptroller, who also serves editor-in-chief of the journal, Prof. Yoram Rabin; he heads the editorial board and has done much

to bring about the journal's success; thanks also to the deputy editor Dr. Matan Guttmann, and to the other members of the editorial board – Shai Mizrahi, Adv. Ronit Sandberg, Adv. and Ms. Ahuva Nevo. I also wish to express my gratitude to the production editors Alon Rodas, Adv., and Ms. Tal Yabetz.

Judge (ret.) Joseph Haim Shapira
The State Comptroller and Ombudsman

Introduction by the Director-General of the Office of the State Comptroller and Ombudsman

Conducting state auditing and of investigating public complaints is characterized by integration of a practical and a theoretical dimension. State audit and public complaint investigation can be conducted in a professional, efficient and innovative manner only through reliance on the highest level of theoretical but relevant research and development.

Indeed, "nothing is practical as good theory"[1]. For the past 58 years, the "**Israel Journal of State Audit**" has provided a platform for studies of theoretical and practical issues in state auditing and the investigation of public complaints. The articles published in this journal in the past, and those that are being published in the present, are an important contribution to the professional theory of state auditing and the investigation of public complaints. They will do much to improve professional work in these complex areas.

The importance of the journal is that it is the only academic framework that deals exclusively with state auditing and public complaints investigation. Since these professional fields move along the border between various areas of knowledge research - political science, law, economics, accounting, etc. – there is, of course, no single academic journal capable of discussing all the various aspects of state audit and the investigation of public complaints integrated along with research and knowledge of these fields. The journal fills this gap and provides a platform for researchers and scholars to discuss issues related to the areas of state auditing and investigation of complaints, viewing these issues from different research angles.

The last issue of the Journal was published in 2011, and since that time, major reforms have taken place in many professional fields that are dealt with the Office of the State Comptroller and Ombudsman, the most important of which has been the writing of our *State Audit - Professional Guide* (2018). The publication of this journal is a further step being taken in the process of strengthening and improving the professional aspect of the work carried out by the Office. The journal's current issue, as well as its next issue, will be characterized by a more academic and professional dimension. The aim is to attract senior researchers to publish studies, while continuing to encourage Ministry employees to share various aspects of their professional work with the academic community and other audiences. In order to increase the circulation of this journal and to increase the professional discourse, we will work to publish this journal in various databases, and will continue to translate articles into the English language, as was done in the past.

1 See, HCJ 1635/90 *Zherzhevskyv vs. Prime Minister* in IsrSC [1991] 45(1) 749, 858 (*per* Justice Barak).

I would like to thank all those involved in the work of publishing Issue 63 of the Journal - first among them being the editor-in-chief, Prof. Yoram Rabin; and the assistant editor, Dr. Matan Guttmann; the members of the editorial board - Shai Mizrahi, Adv. Ronit Sandberg, Adv. and Ms. Ahuva Nevo. Thanks also to the production editor - Alon Rodas, Adv. and Ms. Tal Yabetz. I also wish to thank the director of the editing and publications division, Ms. Shlomit Saban, and the deputy director of the division for publishing, Mr. Yehoshua Hershkovitz.

Elie P. Mersel
Director General (CEO)
Office of the State Comptroller and Ombudsman

Questions and answers with the State Comptroller and Ombudsman of Israel, Judge (ret.) Joseph Haim Shapira

Editor: David Nahir*

During his incumbency as the State Comptroller and Ombudsman, Judge (ret.) Joseph Haim Shapira attended professional conferences and voiced his position on many diverse topics on the State of Israel's agenda and, as an outcome, also on the agenda of State Audit. After five years in office, the editorial board of the "Israel Journal of State Audit" referred questions to the State Comptroller. We are honored to publish the State Comptroller's answers to questions on issues engaging the attention of the Office of the State Comptroller and Ombudsman in recent years, as the opening article in this issue. The dialogue is document herein for our readers' benefit.[1]

Mr. Comptroller, laws usually confer authority on entities [such as to the Knesset in the Basic Law: The Knesset; to the Government in Basic Law: The Government; and to the IDF in Basic Law: The Army]. Basic Law: The State Comptroller and, similarly, the State Comptroller Law, 5718–1958 [consolidated version] (hereinafter – "State Comptroller Law"), however, confer all authority on the State Comptroller personally.[2] Accordingly, the State Comptroller's vision, his world view and his personality are what shape the character and activities of the Office of the State Comptroller. Therefore, considering the considerable impact that the person heading the Office of the State Comptroller has on the office's functioning, we would like to hear a bit about your personal background, about

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1 The term "questions and answers" (Q&A) is the name given to the section of the recorded sources of *Halacha* (Jewish law) during the post-Talmudic era, which includes "all of the written decisions and conclusions issued by the Halachic scholars and teachers to questions sent to them in writing." See: Menahem Alon, THE HEBREW JUDGE, vol. C, 1213 (1973).

2 Another example of a Basic Law that confers authority on a person rather than on an entity, is Basic Law: The President of the State. It should be noted that the State Comptroller is assisted by the employees of his office in performance of his duties. Likewise, he is also authorized to seek the assistance of people who are not employees of his office when necessary (see section 22(b) of the State Comptroller Law, 5718-1958).

how you describe yourself, and in what ways you believe these aspects influence the way in which you fulfill your role as State Comptroller and Ombudsman.

To answer your question, I am a **Jew** – an **Israeli** – a **Jerusalemite**, who worked and works – within the scope of my various roles – to strengthen the democratic and egalitarian nature of the State of Israel and its capital, Jerusalem.

I am a Jew, a descendant of a large family lost during the Holocaust of the Jewish people in Europe. I see myself as a link in the long chain of the generations of the Jewish people, a people who has suffered many hardships, but preserved its uniqueness over thousands of years. I am a Jew who considers Israel's tradition and heritage to be moral foundations thousands of years old, in both the domain of interpersonal relations and the public domain, foundations that vastly predate the "human laws" developed in the modern era, at the end of the 19th century[3], which did not withstand the test of reality during the dark days of the Nazi regime. Among the Jewish principles that gained international recognition are ensuring equal rights and opportunities for all, and the concern for weak populations, the elderly and the helpless, whoever they are – Jews, non-Jewish citizens and residents of Israel, or anyone who linked his fate with the Jewish people. I have been young and now am old, and all the while I believed that there are more common values shared by the various faiths than divisive ones, and that connecting populations of different faiths through shared values can promote the establishment of a pluralistic culture in which everyone can live together. Recently, I came across a book by Rabbi Jonathan Sacks called "Not in God's Name – Confronting Religious Violence." Rabbi Sacks, who served in a senior rabbinical role in the Jewish world,[4] believes that the hope of humankind is the joining of Jews, Christians and Muslims into a single fortified wall that will protect humanity, and that "everyone has his own melody in mankind's vast symphony."[5] I can only concur with these sentiments.

The recognition of the breadth and depth of the fabric of Jewish law led me, in my capacity as the Jerusalem District Court Judge, to incorporate the perspective of Jewish law in dozens of judgments. In my judgment in the matter of **Inbal Ltd.,** I even referred to

3 The Saint Petersburg Declaration of 1868 regarding the prohibition of the use of certain types of bullets in times of war is considered the first formal convention prohibiting the use of particular armaments in times of war. Its full name is Declaration Renouncing the Use, in Times of War, of Explosive Projectiles under 400 Grammes Weight. The declaration is based on the consensus that in times of war, weapons that cause undue suffering must not be used.

See: ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/130?OpenDocument.

4 The Chief Rabbi of the United Hebrew Congregations of the British Commonwealth from 1991 to 2013.

5 Jonathan Sacks, NOT IN GOD'S NAME – CONFRONTING RELIGIOUS VIOLENCE, 267 (2016).

section 1 of the Foundations Of Law, 5740–1980 and ruled in light of "the principles of freedom, justice and integrity of Israel's heritage," including the principles of Jewish law.[6]

I am an Israeli who believes that the State of Israel is the national home of the Jewish people, which can continue to exist as such only if it preserves the foundations of democracy and the values of its Declaration of Independence. Strong and independent state audit, just like a strong and independent judicial system, is an integral part of the foundation of Israeli democracy, and therefore, the Office of the State Comptroller must serve as a balancing and restraining factor, mainly in the field of human rights protection and maintaining the moral integrity of public service.

As an Israeli, I also believe that Israel's security requires the performance of significant substantial state audit, because of the fact that, naturally, there are security issues that cannot be debated in public. In these areas, the State Comptroller's obligation – as a trustee of the public – to ensure that the processes in these areas are conducted as required by the law and according to the rules of good governance augmented. Furthermore, a lack of transparency in these areas is liable to be abused for the purpose of decision-making that benefits the decision-makers or their cronies. This occurred in the past, in such notorious cases as the **Rami Dotan** case.[7] Unfortunately, cases of corruption relating to security property are also currently being investigated. This imposes enhanced responsibility on the State Comptroller handling such matters and requires me to remain unwavering in safeguarding the independence and robustness of the institution of State Comptroller.

Recently, I was asked what I believe to be the most Israeli trait, and I thought that, in my opinion, it is the ability to think fast. I believe that alongside the courage, heroism, "outside of the box" thinking, and even the Israeli *"hutzpa"* [audacity], Israelis are noted for their ability to think fast – to quickly discern the changes taking place in us and in our environment, to react quickly and, if necessary, also to recover quickly from difficult events and keep going. Already in 1963, when I was studying electronics in the IAF Technological College, Dr. Yossi Vardi (my instructor back then) taught us to think fast, and indeed, as a radar technician, I learned that every fraction of a second is critical. His important teachings are with me still. There is a good reason why the Israeli nation has been called the innovation nation – the start-up nation. The aptitude for foreseeing changes, for thinking quickly, before everyone else, about the solutions to problems that are just now emerging, is a trait that is essential in order to succeed in the technological age.

6 Motion (Jerusalem) 1172/02 **Inbal Ltd. vs. Eshkolot Hevron Hotel Ltd.** (published in Nevo, 19.6.2006) (Hebrew). For details, see: Moshe Drori, *Joseph Shapira – The Judge who cherishes Jewish Civil Law*, Maazanei Mishpat H 301 (2012) (Hebrew).

7 See also: Zvi Krochmal, BLEMISH: THE RAMI DOTAN AFFAIR (1997) (Hebrew).

The advantages of fast thinking do not apply solely to the technological sector. At the beginning of my tenure as State Comptroller, I laid out another target for the Office of the State Comptroller's, which is to streamline the bureaucracy and improve the service to citizens. The focus towards streamlining bureaucracy reflects an ability to think fast and attests to preparedness for changes that are currently evolving. In my view, bureaucracy is also liable to foster phenomena of injury to moral integrity. Therefore, cultivating the ability to think fast also helps eradicate phenomena of public corruption and damage to moral integrity.

Needless to say, the ability to think fast does not have to be at the expense of the quality of the resulting conclusions. Moderation and judgment are critical to reaching correct decisions. Fairness in auditing is also a basic value without which auditing would be unable to fulfill its purpose.[8] Balancing between the ability to think fast and all of the other traits mentioned above – moderation, consideration and fairness – is the key to proper decision-making.

I have been a Jerusalemite since the day of my birth at Hadassah Hospital on Mount Scopus in 1945. As a Jerusalemite, I believe in the possibility of building bridges. Since childhood, I have been walking the streets and alleys of Jerusalem and the Old City and feel an inseparable part of the Jerusalem experience. Like anyone walking in the City of David, where our ancestors strode thousands of years ago, I feel the connection between the ancient and the new, between conservativism and innovation. Jerusalem is also characterized by its integration of East and West and serves as an example of the coexistence of people from all ideological movements and from all religions who have been living together for many years in a sort of human mosaic, sometimes peacefully and contentedly, and sometimes slightly less so. Anyone walking in Jerusalem cannot help but feel the tangible sense of history and, at the same time, view with amazement the exceedingly modern architecture and the fruits of the technological advancement flourishing in Jerusalem. Jerusalem is a city with a long-standing tradition. It is not susceptible to rapid changes and fleeting caprices. Jerusalem is sealed in the heart of every Jew and in the heart of the Land of Israel, and there are those who also desire to be buried there. As a Jerusalemite, I believe that a way of life that embraces honesty, fairness, compassion and integrity are not traits that have disappeared from the world. As in every office I've held to date, I try to apply these values also to the work of the Office of the State Comptroller and Ombudsman. I hope to continue doing so until the end of my incumbency, and in my next endeavors.

8 For more about the fairness of auditing, see: State Comptroller, *Additional Work of the Staff of Senior Directors at Universities*, Annual Report 68C (2018) (Hebrew).

How do you work to apply these values within the scope of your role as the State Comptroller and Ombudsman?

At the start of my tenure, I set two key objectives for myself:

One, to protect the standing of the State Comptroller as a leader in the battle against corruption in the public sector and for moral integrity in public service and in reinforcing this standing. To do this both through the performance of in-depth, professional and exhaustive audits in these fields, and through fortifying the protection of whistleblowers who expose instances of corruption. It is doubtful whether many acts of corruption, and certainly also actions that attest to improper governance would have been exposed were it not for the whistleblowers' demonstrations of courage and actions to expose them.

It is also important to say that the in-depth audits that we perform, and the fact that they are exhaustive and sometimes even personal, require us to treat the auditees with fairness and to be meticulous about allowing them their right to a hearing. Recently, there has been an unprecedented rise in applications for a hearing before the State Comptroller, and most of these applications were accepted. It is also worth noting that in the past, the State Comptroller's reports were to be found on the shelves of public libraries, while today, all of the reports are uploaded to the internet and are available to everyone, forever. This reality, which shifted the center of equilibrium between the public's right to know and a person's right not to be libeled and "the right to be forgotten," has implications for auditees' rights, and will require, already in the near future, rethinking and handling by the State Comptroller.

The second objective is to position the Office of the State Comptroller as a significant factor in protecting human rights, individual rights and weak population segments. I was appointed to office shortly after the social protest of the summer of 2011, which had an impact on the public discourse and, to a certain extent, also on how social considerations were included in decision-making on economic issues in Israel. During my speech before the Knesset on the day I was sworn into office, I referred to the social protest as a "herald of good tidings" and added that "the call for social justice is proof that the Israeli public is not indifferent and that it intends – justifiably so – to demand that their elected officials in the Knesset and in the government carry out the tasks imposed on them as agents of the public." This statement is a guiding principle for me today too.

What means are you using to promote the values that you defined for the institution of State Comptroller during your tenure?

One important means to promote these objectives is the application of State Audit on entities that are not audited by virtue of their type but do provide vital public services or

benefit from public funding. This applies particularly to entities operating in the gray area of transparency. The significant advantage of State Audit is the many disciplines in which it engages and its ability to perform systemic examinations of various entities simultaneously. The State Comptroller engages in audit of national topics from a perspective that differs from that of an internal audit. State Audit also examines the effectiveness of the internal audit, and when this audit is not adequately fulfilling its role as a gatekeeper, it will also be audited. Therefore, the State Comptroller must conduct audits of all factors relevant to the matter, particularly when at issue is public budgeting and how the budget is being used.

Accordingly, I exerted tremendous efforts to promote effective auditing of the Keren Kayemeth le-Israel – the Jewish National Fund. The audit focused on the Land Development Administration in the JNF,[9] and this, by virtue of the State Comptroller's authority to conduct audits of entities in which the government participates in managing[10] (participation that is anchored in a treaty signed between the government and the JNF in 1961). Should in the future the JNF be audited by virtue of the law, a parliamentary decision or an agreement between the JNF and the government, it will be possible to expand the audit to all of its activities. In line with this trend, I also acted similarly regarding additional national institutions to promote 'consensual auditing.'[11] I also decided to apply State Audit to the labor unions of the Israel Aerospace Industries, which receives a budget from public funds.[12] Until my decision, the prevailing approach had been that because of what appears in section 9(9) of the State Comptroller Law, a State Audit could only be performed on an "all-inclusive labor union" (such as on the *Histadrut* Labor Federation). Nevertheless, in light of information that came to my attention, whereby grave actions were being carried out in the Israel Aerospace Industries' labor union – which does not fit the definition of an "all-inclusive labor union" – I decided to conduct a State Audit of this entity by virtue of section 9(8) of the State Comptroller Law, given that it receives a budget from Israel Aerospace Industries, whose profits, as a government company, are essentially "public funds." The Israel Aerospace Industries' labor union petitioned against my decision with the High Court of Justice, but this petition was deleted before deliberations, and the Office of the State Comptroller proceeded performing its public mission.

9 The State Comptroller, SPECIAL REPORT – JEWISH NATIONAL FUND – ACTIVITIES FOR DEVELOPING ISRAEL'S LANDS (2017); the State Comptroller, SPECIAL REPORT – JEWISH NATIONAL FUND – FINANCIAL MANAGEMENT OF JNF ACTIVITIES VIS-À-VIS PROPERTY OWNED BY THE STATE – SUPPLEMENTARY REPORT (2017) (Hebrew).

10 State Comptroller Law, 5718-1958 [Consolidated Version], Section 9(5).

11 The State Comptroller*, Israeli Government's Cooperative Efforts with the Jewish Agency*, Annual Report 67C (2017).

12 Israel Aerospace Industries (IAI) is a government company (all of whose profits belong to the government), and it allocates an annual budget of millions of shekels to the IAI's labor union.

In addition to the above, I took action to promote full cooperation between the Office of the State Comptroller and the audited bodies. In my view, the relations between the State Comptroller and the audited bodies should be based on cooperation and mutual respect, and not on arguing. Both sides have a common objective – to promote public service that is untarnished, efficient and effective, conducted according to criteria prescribed by law. Often, the auditees say that the State Comptroller's reports serve as "tools" for them to rectify deficiencies and streamline their functioning.

Cooperation with the Knesset's State Control Committee also helps the State Comptroller to voice his opinions without fear and without bias. By law, the committee can ask the State Comptroller for an opinion on a particular subject, but most of the committee's discussions engage in the findings of the State Comptroller's reports and discuss how the audited bodies should rectify the deficiencies that were found. Since beginning my term of office, there has been fruitful and practical cooperation with all chairmen of this committee. In-depth discussions are held weekly, which have often resulted in augmenting the positive impact of the audit reports.

Fulfilling the public mission of the State Comptroller also requires me to involve myself in controversial issues. There are those who believe that engaging in these issues is liable to adversely affect the public's confidence in the institution of State Comptroller. I do not accept this approach. in my view, the public's confidence, in its profound and long-range sense, is not an outcome of the auditing areas in which the Comptroller engages, because, as long as the subject is publicly controversial, then there will be those who will support the audit findings and those who will object to them, and these positions derive, usually, from the person's viewpoint on the controversial issue. I believe that the public's confidence in the institution of State Comptroller and Ombudsman stems from the public's perception that this institution is relevant and effective, and that it acts independently, with professionalism and integrity. This issue often arises when audit reports are published that deal with elected public officials, and particularly when at issue are reports that indicate a suspicion of unethical conduct. The supporters of the elected public official try to prevent harm to his or her public standing and, sometimes, even try to prevent this "at any price," castigating the State Comptroller himself. On the other hand, the opponents of the elected public official hyperbolize the audit report far beyond what is stated therein. When this happens, the State Comptroller must enable and even encourage the holding of an orderly public debate about the report findings, while maintaining the dignity of the institution and without being dragged into the political arena.

Another example of an audit during which similar dilemmas arose is the audit of Operation Protective Edge, particularly the chapter that scrutinized the operation in light of international law, and "more will be said" about this.[13]

Protecting moral integrity in public service is a foundation stone in the work of the institution of State Comptroller and it is also defined as a constitutional authority. In the preface to the State Comptroller's 2017 report on local government, you wrote: "The Office of the State Comptroller calls the attention of the State's Attorney General to the findings presented in this report, which raise concerns about damage to moral integrity." In light of all the above, do you believe that public servants in the State of Israel are tainted by government corruption?

I believe, as do many others, that the State of Israel is not a corrupt state, and that most public servants are not corrupt. Furthermore, the norms set over the years by the generations of state comptrollers and by the Israeli judicial system – many of which have found their way into the law book of the State of Israel – create an appropriate layer of defense against overall systemic corruption among State employees and its institutions.[14]

Nevertheless, despite the multitude of norms and safeguards, there will always be those who exploit their office, standing and authority in order to reap personal benefits or benefits for their associates. An action taken while improperly using one's authority and the government power accorded an official for personal benefit or for the benefit of associates may reach the level of government corruption. These phenomena must be eradicated. As I have already mentioned numerous times since the beginning of my term in office, many of these acts of corruption are committed clandestinely and with a small number of confidants, and this, among other things, even though there is enhanced transparency, more stringent regulation and heightened importance of the social value of incorruptibility and public denunciation of acts of corruption. Naturally, this reality makes it more difficult to identify these violations and eradicate them. Such suspicion is not a new human phenomenon, a consequence of the spirit of today's era, and it can already be found in descriptions of the work of the Holy Temple. When during the work in the Holy Temple, a concern for corruption hidden somewhere from the public eye, the priests set up safeguards not only in

13 Natan Alterman, *More will be Said about This*, Davar (Israeli daily newspaper), in Alterman's weekly column, the Seventh Column, 16.10.1956 (Hebrew).

14 With regard to the development of this approach, see: Yitzhak Ernst Nebenzahl, *The Significance of Moral Integrity in the State Comptroller Law*, AVRAHAM WEINSHALL – ANTHOLOGY OF ARTICLES IN HIS MEMORY (Naftali Lifschitz, Yitzhak Ganon and Reuven Hecht, editors, 1977); Nurit Israeli, *Fifty Years of Moral Integrity in the State Comptroller Law*, *the Normative Situation – from Creation to Fortification*, Iyunim – Studies in State Auditing, issue 62, 95 (2011) (Hebrew).

order to prevent the corruption itself, but also to dispel any concern of any appearance of corruption. And this is what is written in the *Mishnah* [first compilation of the Jewish oral law] in the Tractate *Shekalim*: "The one that withdrew the appropriate was not allowed to enter the treasury chamber wearing a hemmed cloak, nor with a shoe or a sandal, nor with phylacteries or an amulet, lest he become poor and people say: He became poor because of sinning '[by stealing] in the chamber. Or conversely if he became rich and people say: He became rich from the appropriations of the chamber. For it is one's duty to be free of blame before man as before G-d. As it is written: "And you shall be guiltless before the Lord and before Israel" (Numbers xxxii) and it is written: "So shalt thou find favor and good understanding in the sight of God and man" (Proverbs iii)[15]

Due to the way that acts of corruption are committed, employees should be encouraged to expose corruption; and it is very important in the public realm to protect whistleblowers and to take action to change their public image and their standing in society. These employees are society's eyes and ears inside government bodies and, were it not for whistleblowers, it would be harder to identify acts of corruption and bring those responsible for them to justice.

Mr. State Comptroller, can you elaborate on the measures taken to date to strengthen the protection of whistleblowers?

When I took office, I met with representatives of nonprofit organizations involved in this issue, and with individuals who acted to expose corruption in the past and in the present. From these meetings, I learned that there are several matters that bother whistleblowers, and that because of these, many potential whistleblowers not release the information that they possess to the authorities and do not ask for protection. Among other things, I found out about the difficulties facing the families of whistleblowers, about the duration of the proceedings to clarify whistleblowers' complaints, about the economic burden entailed in managing the proceedings being instituted against the offending entity and about the whistleblower's social isolation. I believe that the situation is different today.

One of the first measures I took was to expand the policy for issuing protection orders. When an employee whistleblower applied to me for a protection order and presented initial evidence that the employer knew about the whistleblowing and made an attempt to harm the employee as a result, I issued a temporary protection order for the whistleblower, *ex parte*, immediately as the petition was filed. I believe that in order to strengthen whistleblowers' confidence in the Office of the Ombudsman and in the Ombudsman's effective capabilities of protecting them, rapid and clear solutions to their problems are

15 Mishnah, Tractate Shekalim, chapter 3, b. (Translation accessed from: http://www.emishnah.com/moed2/shekalim/3.pdf, July 1, 2019.

required. Although there will always be an inherent disparity between an employee's power and an employer's power, temporary protection orders strengthen employee whistleblowers and enable them to reach a hearing attended by both parties shored up by more reinforcement.

Another measure, complementary to the one mentioned above, was to increase the use of mediation during clarification of complaints by the Office of the Ombudsman, with the emphasis on applying the mediation in the area of protecting whistleblowers. Most complaints submitted to the Ombudsman under Chapter Seven of the State Comptroller Law concern a one-time interface between a citizen and an agency, and therefore, when clarifying the complaint, the objective is to resolve the dispute that arose between the individual and this authority in the fairest way. Exceptions to this principle are complaints being submitted under section 45A of the State Comptroller Law – an individual's request to receive protection as a whistleblower. The main purpose during the clarification of these types of complaints is to keep these employees at their workplaces, while supporting them, inter alia, through changing the mindset such that, first of all, their actions are legitimized, and later, promotes recognition of the importance of whistleblowing among the employees and management of the public entity where they are working and, by doing so, prevents further harassment of these employees. This is the essence of the protection from the outset. The mediation option is meant to minimize the personal price that whistleblowers pay for their actions, in order to create a foundation for rehabilitating the atmosphere of belonging and coworker relations in the workplace. If this doesn't happen, what is the point of keeping the employee at his workplace if his work environment labels him, harasses him and ostracizes him and his family?! One must keep in mind that the issuing a protection order is not the end – it is the means. If it is possible to achieve the aims of protecting the whistleblower and of sending a message to the public that society encourages "cleaning of the stables" actions and that it appreciates the courage and personal and professional integrity that are needed for this purpose, even without a protection order being issued, then this should be done. I have held mediation meetings several times in my office with both parties present and, in the end, the parties reached understandings that dispelled the tension between them and enabled the employee to continue working at the same workplace. In this way, the mediation proceedings helped to achieve the purpose of the proceeding, without needing a protection order.

Simultaneously with that stated above, we decided to launch a trial program of holistic handling of whistleblowers. This move began with the assistance of the Witness Protection Authority, which has experience in handling State witnesses and agreed to share its experience with us. Thus, we provided assigned an experienced psychologist from the Witness Protection Authority, who possesses extensive experience in this field, to assist whistleblowers and their families. The investment in this area contributed greatly to the

whistleblowers' positivity and helped them during the difficult times coping with an employer that was hurting them and helped to support and strengthen them. As time passed, it became evident just how much this course of action was necessary and, within the framework of the cooperation with the Witness Protection Authority, we resolved problems that whistleblowers faced even when the proceeding clarifying their complaint had ended years ago, as well as those whom State Comptrollers have recognized as being deserving of receiving protection orders as whistleblowers, but who did not fulfill the criteria prescribed in the law in their case.[16] Within this context, I will add that the standing of the State Comptroller also helped find solutions to additional problems that employee whistleblowers, who were not entitled to a protection order, had to contend with, including finding them alternative employment.

Within the scope of expanding the protection of whistleblowers, I ruled that employers are obligated to provide their employees with a protected work environment. Later on, I ruled that any employee who was subjected to harassment in the workplace, which the employer knew about but did nothing to prevent, is entitled to a protection order. This ruling has the nature of a precedent since, although such employee protection had been the warranted measure and is customary in the public realm, the prohibition of employers from harassing their employees has not yet been anchored in legislation.[17] Under my directive, the authority to transfer the handling violations of protection orders to the State Attorney General was also exercised for the first time, pursuant to section 43(d) of the law. The State Attorney General and the State Attorney, who agreed with me about the importance of protecting whistleblowers, passed the report on violations of protection orders for whistleblowers to the Israel Police for handling. In January 2018, I thought that this was not enough, and therefore, I instructed our Office to directly file a complaint with the police against a mayor who knowingly and deliberately violated a protection order issued to an employee of that municipality. Besides the legal obligation to uphold orders issued by the State Comptroller, there is a need to be diligent about enforcement of these orders, also because compliance with protection orders is a foundation stone in the creation of effective protection of whistleblowers and, as an outcome, in strengthening the safeguarding of moral integrity.

In order to alleviate the economic burden imposed on whistleblowers, I took action on two levels. The first, at the outset of a proceeding, and the second, when adjudicating the compensation at the conclusion of the proceeding. With regard to the opening of the

16 For example: A complaint by an employee in a labor union that was not recognized as an entity for which complaints against it may be clarified pursuant to Chapter Seven, and a complaint by a police officer (police officers, prison guards and soldiers are excluded from State Comptroller Law, 5718-1958, section 45A.

17 A draft bill, Prevention of Abuse in the Workplace, 5775–2015 had been submitted to the Knesset in the past, but the legislation was not completed. A similar draft bill was submitted recently – Draft Bill for the Prevention of Occupational Harassment, 5778–2018.

proceeding – I took action in collaboration with the Minister of Justice (at that time), Knesset member Tzipi Livni, and with Knesset Member Mickey Rosenthal to amend the rules of eligibility for legal aid. Today, every whistleblower is entitled to legal representation for free from the State, independent of any income test[18]

At the conclusion of the proceeding, if the complainants opted to not continue working at the employer where they suffered injury, I adjudicated special compensation that embodied the economic damage caused to them as a result of the termination of their employment but, more than that, also the cost of conducting the proceeding and the mental anguish caused to them. Recently, I even adjudicated inclusive compensation at the sum of NIS 750,000 for an employee whistleblower who was forced to leave his job at a local authority. Within this context, I note that, recently, several discussions were held in our Office about the appropriate circumstances and cases when it will be appropriate to obligate whistleblower harassers personally to pay compensation, instead of imposing all the liability for paying compensation on the public treasury.

In June 2017, representatives of the Office of State Comptroller participated in an international academic conference on the subject of whistleblower protection, held in Oslo, Norway. The University of Middlesex in England and the Norwegian FAFO Foundation organized the conference, which engages in human rights and investigates, among other things, the issue of employee rights in Europe. About 50 academic scholars, representatives of organizations and whistleblowers from many countries including Britain, Norway, Holland and Australia, participated in this conference, and the lectures presented during the conference addressed the psychological, legal and social aspects of whistleblower protection.

A significant number of countries have no institution empowered by law to provide operative relief to whistleblowers (such as Holland, Norway and Britain), and in countries that do have such an institution (such as Serbia and Slovenia), for the most part, at issue is a new institution that does not provide protection to whistleblowers at the scale at which the Israel Ombudsman does. Conference participants expressed considerable interest in the activities of the Israeli Ombudsman as they pertain to protecting and assisting whistleblowers.

During conversations held with conference participants, it became evident that the Israel Ombudsman has extensive executive authorities with regard to whistleblower protection, and that compared to other countries, he exercises his authority broadly to protect them. For example, in 2016, I issued 25 protection orders – six permanent protection orders and 19 temporary protection orders. In 16 cases, relief was provided to the complainant through a mutually agreed solution between the parties. In 2017, I issued 17 protection orders – six

18 Legal Aid Law (Amendment No. 12), 5775–2014, Codex of Laws 2476.

permanent protection orders and 11 temporary protection orders. In 11 cases, relief was provided to the complainant through a mutually agreed solution between the parties. Spotlighted during the conference was the Israel Ombudsman's policy of expanding the scope of the protection being provided to whistleblowers, inter alia, by providing emotional assistance and support to them and to their families. The purpose of this assistance is to enable whistleblowers to contend with the distress, the emotional tension and the social and economic pressures that they often suffer due to the exposure.

I believe that inasmuch as the enhanced protection currently being provided to whistleblowers and as a result of the audited bodies being more aware of the audit reports, of the Ombudsman's decisions and of the protection orders, greater care is now being taken than in the past to not retaliate against employees who expose corruption, expose statutory violations or improper governance.

Do you believe that there is room for further progress on the subject of strengthening whistleblower protection?

Indeed, I do. Despite all of the work, I believe that there is room to delegate additional authority to the Ombudsman, mainly relating to the enforcement of protection orders, including the granting of legal authority to impose administrative pecuniary sanctions on violators of protection orders, and we are working on various levels in this regard.

I believe that two additional legislative amendments are necessary: one – expanding the Ombudsman's authority to issue protection orders also in favor of police officers, prison guards and soldiers, who were excluded from section 45A(1) of the law (due to their special standing, which is characterized by normative dualism). Although the employment of security services personnel has unique characteristics, when it comes to exposing corruption, there is no justification for differentiating between them and all other public servants. There are also whistleblowers among security services personnel who are continually harmed due to their activities exposing corruption and they are in need of protection, which, according to the existing law, they are not entitled to receive from the Ombudsman. The second – expanding the Ombudsman's authority to issue special protection orders in favor of all gatekeepers, in line with section 45A(2) of the law, when an attempt has been made to constrain their activities and hamper their authorities during the fulfillment of their roles, similar to the authority that the law accords the Ombudsman during his handling of incidents involving internal auditors. The proposed second amendment is nothing more than an expansion of the protection existing in the law in relation to internal auditors; however, as long as this authority is not expanded to all other gatekeepers as well, this protection remains only partial.

The protection of whistleblowers is essential for the purposes of maintaining moral integrity in public service and for battling corruption in the public sector, but, besides this, it is also necessary for the purpose of protecting these employees' right to dignity. As you have said numerous times, also in the broad context and not only within the framework of clarifying complaints, you ascribe to the Office of the State Comptroller a key role in promoting the protection of human rights and the standing of social rights. Why do you attribute this role to your office?

According to my line of reasoning, the Israel State Comptroller and Ombudsman must also fulfill the role that is called internationally "Human Rights Commissioner."[19] At issue is not an innovation, since already back in 2000, about two decades ago, the State Comptroller at that time, Judge (ret.) Eliezer Goldberg, sought to amend the law in a way that would add express authority to the State Comptroller – legally and constitutionally – to investigate human rights violations. I also believe that such an amendment is needed.

Prof. Aharon Barak reiterated this recently,[20] when he said: "The State Comptroller – both in his general auditing role and as ombudsman – must ensure that constitutional rights are honored. Indeed, the provisions of section 2(b) of the Basic Law: The State Comptroller prescribe that: 'The State Comptroller will examine the legality of the actions ... of the audited bodies.' This provision authorizes the State Comptroller to ascertain whether the Executive Authority is adequately protecting individuals' constitutional rights vis-à-vis the State. In my opinion, this is not enough ... it is advisable ... that the State Comptroller – both in his general roles and as ombudsman – should consider one of his roles as being that of **Human Rights Commissioner**." (emphases appear in the original).

The explanation for this position lies in the constitutional development of the State of Israel and in the trends in this field in the international arena, including the establishment of national institutions to protect human rights that, in recent decades, have also been called "National Human Rights Institutions."[21]

As is known, following the enactment of the Basic Laws addressing individual rights and the judgment known as the **Bank Mizrahi** Case,[22] Israeli law was revolutionized, and the State

19 I referred to this in my opening remarks at the *Conference on the Institution of the State Comptroller and Ombudsman in a Changing Social Environment* (Interdisciplinary Center Herzliya, July 11, 2013).

20 See: Aharon Barak, *The State Comptroller and Human Rights in Israel*, Mivhar Katavim [Selected Writings], Vol. 3, Constitutional Studies 81, 83-84 (2017) (Hebrew). A version of this article is also published in this journal, on pg. 37 (2018) (Hebrew).

21 For an elaboration, see the article by Eli Marzel, Matan Gutman and Alon Rhodes *From State Comptroller to Human Rights Commissioner – a Short and Essential Path*, in this journal, on pg. 49 (2018).

22 Civil Appeal 6821/93 *United Mizrahi Bank Ltd. vs. Migdal Cooperative Village*, 49(4) Court Ruling 221 (1995) (Hebrew).

of Israel became a constitutional democracy.[23] From that point on, democratic values, such as human rights, rule of law and separation of authorities, have been anchored as constitutional norms. In my view, alongside the central role of the Israeli judicial system in safeguarding these values, a constitutional institution, such as the State Comptroller and Ombudsman, can and needs to contribute to preserving and promoting the constitutional-democratic values in the State of Israel.

On the international plain, after more than one hundred institutions for the protection of human rights have been established since the 1970s, an international workshop sponsored by the United Nations was convened in Paris in 1991, which defined principles outlining the characteristics of a national human rights protection institution, called "the Paris Principles." The UN General Assembly adopted these principles in 1993.[24] Auditing and ombudsman institutions throughout the world instituted changes consistent with these trends, and, more so than in the past, they are also focusing on protecting and promoting human rights. In the absence of such a designated institution in the State of Israel, this task is naturally imposed on the institution of the State Comptroller and Ombudsman.

The activities of the State Comptroller and Ombudsman in the human rights arena have many diverse advantages and are capable of contributing greatly to the protection, promotion and exercise of human rights in the State of Israel, alongside the activities of other government authorities, mainly the Judicial Authority.

The advantages of the institution of the State Comptroller and Ombudsman in the field of protecting human rights derive from several main reasons:[25]

The first is the ongoing nature of the State Comptroller's work and the fruitful dialogue that he maintains with the audited bodies, which facilitates the inculcation of new values into the routine work of the audited bodies. Within this context, the ability to monitor the rectification of deficiencies and to examine multiyear processes also constitute a relative advantages of state audit in terms of inculcating human rights values.

The second is the proactive nature of an audit. Unlike the Judicial Authority, the State Comptroller can predefine an audit plan that will focus on the field of protecting and promoting human rights, and he can perform an audit of urgent and major issues in real time. Furthermore, he is able to conduct long-range, comprehensive systemic examinations

23 Aharon Barak, JUDGE IN A DEMOCRATIC SOCIETY, 79 (2004) (Hebrew).

24 G. A. Res. 134, UN GAOR, 48th Sess. 85th mtg, U.N. Doc. A/RES/48/134(1993); Linda C. Reif, THE OMBUDSMAN, GOOD GOVERNANCE, AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM 5 (2004).

25 I elaborated on these reasons during the lecture I presented at a conference in this regard. See: Joseph Haim Shapira, "Protecting Human Rights in State Audit in the Constitutional Era," at a conference on the subject of human dignity, held at the residence of Israel's President, Reuven Rivlin, April 29, 2015 (the State Comptroller's lecture was published in its entirety on the website of the Office of the State Comptroller, www.mevaker.gov.il).

of several audited bodies simultaneously, and thus contribute to the effectiveness of the protection of human rights.[26]

The third reason relates to the scope of the State Comptroller's authority. The Judicial Authority is restricted to examining the legality of an authority's actions, and it operates according to legal procedures and the rules of evidence whereas, on the other hand, the Basic Law: The State Comptroller authorizes the State Comptroller to examine audited bodies' activities also with regard to their economy, efficiency and effectiveness.[27] In his capacity as the Ombudsman, the State Comptroller may accept an individual's complaint not only when at issue is an action that was committed in violation of the law or without any legal authority, but also in instances of excessive intransigence and obvious injustice.[28] This authority expands the State Comptroller's ability to protect and promote human rights among the audited bodies.

The fourth concerns the essence of social rights. Although the enforcement of social rights through the courts is controversial, there is broad recognition of the fact that the audit and public complaint hearing institutions, which are nonjudicial entities, are appropriate and proper institutions for examining how social rights are being implemented by the Executive Authority. In line with this approach, many audit entities around the world adopted the role of "social rights agent", while exercising the unique authority delegated to them to conduct audits, clarify complaints and enforcement in this field.[29] The increased use of mediation proceedings within the framework of clarifying complaints and the appointment of designated employees in this field are part of the implementation of these principles in our office, given that they are consistent with the guideline provided in the State Comptroller's recommendations. This is how an effective impetus was created to protect social rights.

The unique structure of the Office of the State Comptroller and Ombudsman in Israel, which integrates the supreme audit institution with the institution of ombudsman under one roof, is also a reason to strengthen the State Comptroller's activities in the field of human rights. On the one hand, a plethora of complaints about human rights violations constitutes a gage, for the Office of the State Comptroller, to initiate an audit in that field. On the other hand, systemic audit helps the Ombudsman clarify complaints in these fields while taking an

26 The honorable Judge Salim Joubran wrote statements along these lines in his article *The Role of the State Comptroller in Constitutional-Institutional Law: Social Rights as a Case Study*, in this journal, on pg. 43 (2018).

27 Basic Law: The State Comptroller, Section 2(b).

28 State Comptroller Law 5718-1958, Section 37.

29 Ann Abraham, *The Future in International Perspective: The Ombudsman as Agent of Rights, Justice and Democracy*, (Vol. 61, Issue 4 2008); see, for example: the website of the Greek Ombudsman at www.synigoros.gr/?i=health-and-social-welfare.en.ho (last checked on 15.5.2017); see the website of the Comptroller of the State of New York, at https://comptroller.nyc.gov/about/duties-of-the-comptroller (last checked on 15.5.2017).

overarching view of the considerations and circumstances. This unique synergy provides an advantage to the institution of State Comptroller and Ombudsman in all matters pertaining to protecting and safeguarding human rights.

It is important to clarify that the intensification of audit in social fields was not done at the expense of the anti-corruption efforts. With the framework of social emphases, the Office of the State Comptroller engages in such issues as determining the State Budget, the management of the budget by the audited bodies, and even concrete issues, such as the centralization in the economy and the cost of living.[30] Considering the fact that these matters affect the lives of all citizens in the State, including their exercise of individual rights and social-economic rights, this audit is also performed from the perspective of constitutional rights that received expression, inter alia, in international human rights and social rights conventions that Israel has joined.

Another central principle that helps to ensure the exercise of human rights is the "right of access to the Ombudsman." This right is very similar to the "right of access to courts," which received constitutional standing in Israeli law.[31] The reasons and justifications for both rights are very similar. Section 33 of the State Comptroller Law prescribes that "every person is allowed to submit a complaint to the Ombudsman." In the explanatory notes to the law, it is written that "every person has the right to submit a complaint, without exception."[32] The importance of this ruling derives from the fact that recognizing a person's right is not enough if it is not accompanied by the right to refer to a body that can provide protection if that right is violated.[33] Granting every person the right to submit a complaint eliminates a major obstacle that is liable to hinder the exercise of this right. A unique arrangement, whose objective is to promote the exercise of this right, is the absence of an economic obstacle of the type that characterizes applications to other bodies, including the courts. Within this context, the explanatory notes to the draft bill state that "in order to make it easier for complainants, there is no obligation to pay any fee for the submission of a complaint."[34] Also the fact that a complainant is not obligated to pay the expenses of the

30 See, for example, the chapter addressing *The Process of Preparing and Updating the State Budget*, State Comptroller, Annual Report No. 62 – for 2011 and Fiscal Year 2010 Accounts (2012); the chapter on the subject of *The Government's Efforts to Contend with Centralization in the Economy*, State Comptroller, Annual Report No. 66A (2015).

31 Aharon Barak, *The Right of Access to the Judicial System*, SHLOMO LEVIN BOOK, 31 (2013) (Hebrew); Yoram Rabin, *The Right of Access to the Courts – From an Ordinary Right to a Constitutional Right*, Hamishpat, E 217 (2001) (Hebrew).

32 Explanatory notes to the draft bill: The State Comptroller Law (Amendment No. 5), 5729–1969, proposed bill 858.

33 See and compare: Aharon Barak*, The Right of Access to the Judicial System*, *footnote* 31 above, on pg. 34; Yoram Rabin, THE RIGHT OF ACCESS TO THE COURTS AS A CONSTITUTIONAL RIGHT, 46 (1998) (Hebrew).

34 Explanatory notes to the draft bill: The State Comptroller Law (Amendment No. 5), 5724–1964, proposed bill 500, 51.

proceeding, if it is found that his complaint is not justified, serves the objective for which this right was given. Within the framework of this broad authority, the Ombudsman has received complaints from tourists and even from citizens from countries with whom the State of Israel has no diplomatic ties, and their complaints were investigated. This situation enables anyone who hesitated to exercise his rights because of his financial inability to cover the costs of a legal proceeding (which requires the payment of fees, representation expenses, etc.) to apply to the Ombudsman for the purpose of clarifying his complaint. For this reason, and since the very ability to apply to the Ombudsman is a basic right, it is very important that the doors to the Ombudsman Commission remain wide open to every person.

How do you implement your approach whereby the State Comptroller and Ombudsman must also serve as a human rights commissioner within the scope of the Office's work?

We implement this approach within the framework of audit and clarifying public complaints work when we examine the legality of the actions, the moral integrity, good governance, effectiveness and economy of audited bodies,[35] inter alia, from the viewpoint of promoting human rights – in other words, we are examine whether the audited bodies are complying with human rights laws in their broadest sense, and whether they are honoring the constitutional human rights that are anchored in the Basic Laws and in international conventions that are binding upon Israel. Within the framework of the activities of the institution of State Comptroller relating to human rights, the Office examines whether the infringement of human rights was consistent with the requirement that the infringement must pass the tests of proportionality and guides the State authorities effectively and wisely in relation to promoting the exercise of constitutional human rights.

A few of the many examples of the implementation of these principles within the framework of the work of the Ombudsman are the examination of the evacuation of the residents of Migron in Samaria, with the emphasis on the evacuation of the children, in view of the constitutional values of human dignity and the conventions that are binding upon the State of Israel, inter alia, in relation to the protection of child welfare,[36] and an investigation of the medical care that the Israel Prison Service provided to a security prisoner.[37] Additional examples may be found in the Annual Report 43 of the Ombudsman for 2016, which publicizes the results of the clarification of complaints in relation to numerous matters pertaining to human rights and social rights, including: the Ombudsman's recommendation

35 Basic Law: The State Comptroller, Section 2(b).

36 Ombudsman, *Complaints by Three Families Relating to the Evacuation of the Migron Community* (March 4, 2014) (Hebrew).

37 Ombudsman, Annual Report 41 for 2014 (2015).

that the freedom of expression of users of social networks should not be infringed upon when they are responding to Facebook pages of elected officials, as long as known and transparent criteria have not yet been prescribed in the regulations of these pages;[38] the Ombudsman's position regarding the matter of infringement of proprietary rights during a police operation; and the Ombudsman's decisions regarding the exercise of rights relating to the right to public housing.

In the field of audit, the safeguarding of human rights receives expression in both the annual reports and in our Office's special reports that address, among other issues, the following: nutrition security,[39] the State's handling of aliens and asylum seekers,[40] education for co-existence and preventing racism,[41] employment of minorities and persons with disabilities[42] and the State's handling of the elderly requiring nursing care.[43]

In the final analysis, the test that checks whether human rights are being exercised is the protection of the rights of a society's weak populations. The ensuring of social justice depends mainly on the exercise of these rights and on providing them to all those entitled to them. And as I mentioned in one of the reports, "in a just society, which is founded on values of justice and equality, one should expect that the road to exercising these rights will be open and accessible to the widest possible population. The Public Authority, which is a trustee of the public, is under an obligation to grant the right to those entitled to it, and it is appropriate that it should take action to provide the public with the information in its possession, particularly information about the very existence of the right and about the conditions for receiving it, in a full and transparent manner."[44]

The Ombudsman's reports and the State Comptroller's reports, therefore, engage in subjects founded on human and civil rights. Placing them at the top of the public agenda reflects the appropriate policy according to which the State Comptroller and Ombudsman acts as the protector and promoter of human rights.[45]

38 Ombudsman, Annual Report 43 for 2016 (2017).

39 State Comptroller, SPECIAL AUDIT REPORT – GOVERNMENT ACTIVITIES TO PROMOTE NUTRITION SECURITY (2014).

40 The State Comptroller, *Non-Deportable Aliens in Israel*, Annual Report 64C for 2013 and for Fiscal Year 2012 Accounts (2014).

41 State Comptroller, SPECIAL AUDIT REPORT – COEXISTENCE EDUCATION (2016).

42 State Comptroller, *The State's Activities to Encourage the Integration of the Arab Population in Employment*, Annual Report 66C for 2015 and for Fiscal Year 2014 Accounts (2016); State Comptroller, *The State's Activities towards the Integration of Persons with Disabilities in Employment*, Annual Report 64C for 2013 and for Fiscal Year 2012 Accounts (2014).

43 State Comptroller, SPECIAL AUDIT REPORT – THE STATE'S HANDLING OF IN-HOME NURSING CARE FOR THE ELDERLY (2017).

44 The State Comptroller, *Non-Exercise of Social Rights*, Annual Report 65C for 2014 and for Fiscal Year 2013 Accounts, 8 (2015).

45 The State Comptroller, GOVERNMENT ACTIVITIES TO PROMOTE NUTRITION SECURITY (2014); STATE ASSISTANCE TO HOLOCAUST SURVIVORS (2017); *id.,* footnote 43.

Mr. State Comptroller, our era is characterized by accelerated technological evolution. What new challenges do you think this era poses to the institution of State Comptroller?

Indeed, the reality of modern life give rise to frequent rapid changes in society, in the economy, in technology and, basically, in all spheres of life. All government institutions must adapt themselves to this changing reality. The State's institutions must not stagnate. They must maintain constant movement. In the judicial arena, Prof. Aharon Barak said that "the law must be stable, but it must not stand still. Stability without change leads to decline. Change without stability is anarchy ... there is no guarantee of stability, certainty, consistency and continuity without guaranteeing change. Like an eagle in the sky that maintains its stability only when in flight, this is also true for the law. It will only be stable when it is in movement."[46] Although the audit field is perceived as a conservative field, it is essential that this principle also be implemented in the institution of State Comptroller. The institution of State Comptroller must move forward in order to sustain its stability, because otherwise, this institution is liable to lose the public's confidence, which is its lifeline.

As Willem de Kooning said, "You have to change to stay the same." It is important, however, to ensure that this movement is carried out while simultaneously maintaining balance, by considering the traditional fundamental advantages of audit, which play a key role in safeguarding the quality and professionalism of audit work and clarifying public complaints. Maintaining these foundations enables work to be done while maintaining an "institutional memory" and helps to base our Office's work on deep-rooted accepted standards.[47]

As a rule, the adoption of a culture of innovation is not something that goes without saying in any organization, particularly not in conservative institutions, such as audit and ombudsman institutions. Our office, however, is spearheading the creation of a culture of innovation and of implementing new ideas, with the assistance of and collaboration with all employees of our Office and while demonstrating openness to different ideas. To this end, an "innovation lab" was established in our Office, which centralizes the proposals and ideas submitted by all employees of the office and, to the extent possible, fuses them into workplans.

One example of this can be found in the Yes II Conference, a conference of young employees of the European Organization of Supreme Audit Institutions, the EUROSAI, which our Office held in Jerusalem at the end of 2015, and which was attended by about 80

46 Aharon Barak, *The Role of the Supreme Court in a Democratic Society*, Hapraklit 41 5, 7 (1993) (Hebrew).

47 Joseph Haim Shapira, *Innovation in the Office of State Comptroller*, Eli Hurvitz Conference on Economy and Society (2016) (Hebrew).

representatives from audit institutions from all across Europe.[48] Among other things, operative recommendations were formulated during the conference concerning the nature of the activities of the institutions that are members of the organization in the technological era.

In order for the institution of State Comptroller to succeed in its task and successfully fulfill the demands posed by the reality of life, it must contend with two interrelated challenges. The first challenge is the impact of the technological era on the relations between state audit and the public and the media, and the impact of the technological era on the relations between the State Comptroller and the audited bodies. The second challenge is a challenge that I call 'social changes in the social networking era.' Understandably, the technological era also increases the need for strengthening the cooperation between the institution of State Comptroller and supreme audit institutions throughout the world and with international audit organizations.

In what ways do you believe that the technological era impacts the relations between the Office of the State Comptroller, the general public and the various media, and in what ways is the Office of the State Comptroller preparing to contend with this challenge?

I will begin by referring to the impact of the technological era on the relations between the Office of the State Comptroller, the public and the media. In recent years, we have witnessed enormous changes in the field of mass media. The evolution of the internet, smartphones, tablets, the development of social networks and all the rest of the technological advancements are changing the world. At issue is a revolution of the same magnitude as the printing revolution. This era poses a significant challenge to the institution of State Comptroller, since publicizing audit findings and the results of investigations of public complaints and bringing them to the attention of the general public plays an extremely important role in a democratic regime.

In the past, the "dialogue" between the Office of the State Comptroller and the public took place mainly through the audit reports. As an outcome of this, the extent to which the general public was exposed to the audit findings had been rather limited, and their exposure

48 At the end of the conference, I said that: "The Hague Congress [the congress of the European Organization of Supreme Audit Institutions – EUROSAI, which was held in Holland in June 2014 – JHS], focused on renewal and innovation. The theme of the congress was the changing discourse about audit, from discourse characterized by the statement 'yes, but' to one that is open and accepting, characterized by the statement 'yes, and'. This is what is going on at this conference too, which integrates the uniqueness and complexity of generation Y, which strives for frequent and rapid renewal and progress, with the importance of public audit as a whole, in order to strengthen the democratic fabric and good public governance, particularly in supreme audit institutions. It was for good reason that the name of the conference is SAI&I, which reflects the fusing of the trend of individualism that typifies this generation and the public responsibility that is required of supreme audit institutions."

was mainly through traditional communications media. In many respects, all communications media serve as "the watchdogs of democracy." They maintain a relationship of complementarity and harmony in defending the principles of proper governance, moral integrity and in inculcating the concept of the "accountability" of public servants and elected officials in the governmental culture in Israel.[49] It appears, however, that this solution is incomplete, since these entities publish only the highlights of the findings, particularly findings that are of great interest to the public, in their viewpoint.

Nevertheless, in recent years, we increased our cooperation with the traditional communications media, and within the framework of the extensive activities of our Office's spokesperson, many employees and managers are now giving interviews in the various media. Over a particular period, our Office even had a regular segment on a morning television show during which we presented complaints that were clarified by the Office and the remedy that I arranged as the Ombudsman, and this, in order to increase the public's exposure to the Office. Alongside this activity, and for the purpose of increasing the public's access to the audit reports and to ensure objectivity, independence and accuracy of the content being disseminated to the public, I decided to increase our use of direct information channels for publication of the audit findings and the outcomes of complaint clarifications. As a result, in recent years, our Office began being active on social networks such as Facebook and YouTube and uploaded short video clips that summarize important audit reports.

These activities do not undermine the validity of my viewpoint that the communications media are "allies" of the Office of the State Comptroller,[50] since the relations between state audit and the media are bilateral: in one direction, the media helps to convey the State Comptroller's reports to the general public and thus serves as a key and central means to publicize audit findings, to promote internalization of the audit and increase the recognition of the need to rectify deficiencies among the auditees. In the other direction, the Office of the State Comptroller frequently receives valuable information from the media, and journalists' exposés often prompt the State Comptroller to open an investigation.[51]

Therefore, the developments in our Office in the fields of technology and communications are tools to achieve closer contacts between the Office of the State Comptroller and the public, and they serve as another channel of communications between our office and the public through the communications media. Note that as an auditing institution, it is

49 Joseph Haim Shapira, *State Audit in the Media Age*, the Center for Communications and Law at Bar-Ilan University (October 1, 2013).

50 Id.

51 Id.

important that every use that it makes of the new technological means of communication and of the traditional means of communication is done at the appropriate level.

Strengthening the connections between the institution of State Comptroller and the public during the term of office is not limited to the emphases made within the framework of the audit work or to the expansion and enhancement of the Office's presence in the new media. This policy also encompasses paying attention to the entire population and ensuring that the reports are accessible by additional audiences that do not frequently make use of technological channels. During my speech before the Knesset when I gave my statement of allegiance, I addressed the Arab minority in the State of Israel in Arabic, and I asked them to cooperate with the Office of the State Comptroller and to refer any instance of injustice to us. Upon taking office, I instructed the professional staff in my Office to begin translating the introductions of the audit reports into Arabic[52] and, in a special case, to translate the entire report.[53] In view of the findings of public opinion surveys that showed that the ultra-orthodox community is not sufficiently familiar with the institution of State Comptroller, I instructed the Office to promote dialogue with media sources and public opinion leaders in this population segment to strengthen this community's confidence in the institution of State Comptroller and Ombudsman.

Has ensuring that the various segments of the population in Israel have access to the audit reports also led to a change in approach, as it pertains to involving Israeli society in additional stages of the work of the Office of the State Comptroller?

52 تقارير الرقابة على الحكم المحلي لعام 2017 (21/11/2017); الاستعداد الوطني للدفاع ضد تهديد الطائرات المسيّرة (15/11/2017); التقرير السنوي 68أ (25/10/2017); تقرير مراقبة خاص: رعاية الدولة لكبار السن القاطنين في بيوتهم (01/10/2017); قرير مراقبة خاص : جوانب بأنشطة وزارة الاتصالات لتنظيم قطاع الاتصالات الثابتة - تنفيذ إصلاح "سوق الجملة". الاستثمار في الهياكل الأساسية في قطاع الاتصالات الثابتة والجوانب الهيكلية؛ تضارب مصالح رئيس الوزراء في دوره كوزير للاتصالات (12/07/2017); مندوب شكاوى الجمهور - التقرير السنوي 43 لعام 2016 (26/06/2017); التقرير السنوي 67 ب (16/05/2017); عملية "الجرف الصامد" (28/02/2017); الصندوق الوطني اليهودي - أنشطة لتطوير أراضي إسرائيل (18/01/2017); استعدادات الجبهة الداخلية ضد تهديد الصواريخ والقذائف (حماية مادية ، انذار ، واخلاء السكان) (06/12/2016); تقارير الرقابة على الحكم المحلي لعام 2016 (22/11/2016); التقرير السنوي 67أ (01/11/2016); تعليم لحياة مشتركة لمنع العنصرية (22/09/2016); مندوب شكاوى الجمهور - التقرير السنوي 42 لعام 2015 (18/07/2016); التقرير السنوي 66ج (24/05/2016); آلية تحصيل الديون في سلطة التنفيذ (19/04/2016); التقرير السنوي 66ب (28/03/2016); تقارير الرقابة على الحكم المحلي لعام (25/11/2015); التقرير السنوي 66أ (28/10/2015); مندوب شكاوى الجمهور - التقرير السنوي 41 لعام 2014 (07/07/2015); التقرير السنوي 65ج (05/05/2015); تطبيق الإصلاحات وتقليص الفوارق في التعليم لمرحلة الطفولة المبكّرة (05/05/2015); تقارير الرقابة على الحكم المحلي لعام 2014 (29/12/2014); التقرير السنوي 65ب (29/12/2014); ابداء الرأي: حول استخدام شرطة اسرائيل لجهاز الصعق الكهربائي من نوع طايزر (09/12/2014); التقرير السنوي 65أ (29/10/2014); مندوب شكاوى الجمهور - التقرير السنوي 40 لعام 2013 (24/06/2014); التقرير السنوي 64ج لعام 2013 ولحسابات السنة المالية 2012 (13/05/2014); التقرير السنوي 64ب (10/03/2014); الجاهزية لانتخابات الكنيست التاسع عشر وادارتها (26/02/2014); تقارير الرقابة على الحكم المحلي لعام 2013 (22/01/2014); التقرير السنوي 64أ (15/10/2013); لتقرير السنوي 63ج لعام 2012 ولحسابات السنة المالية 2012 (08/05/2013).

53 نشاطات الحكومة لتوفير الأمن الغذائي (דוח מיוחד, 7.4.2014)

The customary approach today is that the public – as the main target audience of the audit reports – also needs to be involved in the preliminary audit processes. International research studies have shown that involving the public in the various stages of the audit work is extremely beneficial to state audit institutions. Effective "public collaboration" in audit proceedings is defined as a process through which the proposals of the public, or of a portion thereof, its problems, needs and values, receive expression in the auditing institution's decisions. This is a bilateral process, and the relations maintained with the public through it may improve the audit institution's decision-making process.

A survey conducted in 2010 by the International Organization of Supreme Audit Institutions (INTOSAI) among state audit institutions throughout the world identified three modes of public participation: the first way is by disseminating information to the public through the audit reports. The second way is by consulting the public within the framework of the audit proceeding as a means to expand the factual base on which the audit is based. The third way is by involving the public in the decision-making (whether in terms of choosing the audit topic or during the audit itself).

Today, recommendations for conducting public participation proceedings during state audits appear in INTOSAI's latest international standards for state audit institutions. Of course, the proper mix that works for the Israeli audit institution must be selected, and this, by ensuring that the traditional fundamentals of state audit and the principle of legality are preserved and by ensuring that the holding of a public participation proceeding will not impair the independence of the audit institution.

In recent years, we expanded our use of various public participation tools. Beginning with disseminating questionnaires to the parties involved and using the considerable information received through them for the purpose of our audit work,[54] through publishing an open call to the public (survey) to provide information about topics being addressed by an audit,[55] and ending with having the public actively participate in the audit work, including through focus groups.[56] Recently, Knesset Member Tamar Zandberg reached out to me to ask that when the public participation proceeding is conducted through questionnaires disseminated to the general public, we should make sure that the questionnaires are also accessible by speakers of other languages. As a result of this, I instructed that preparations be made to

54 State Comptroller, *Aspects of the Activities of the IDF Disabled Veterans Organization and Issues Relating to IDF Disabled Veterans*, **Annual Report 64B**, 59 (2014); State Comptroller, *Local Authorities' Employment of External Consultants*, Reports on Auditing of Local Government 2015 (2015).

55 See: Opinion poll on the subject of the State's handling of the population receiving nursing-care benefits in Israel (National Insurance Institute recipients) (published on December 5, 2016); survey on the services provided by the Israel Postal Company (published on July 3, 2017).

56 As performed within the framework of the audit work for the Special Report, *id.,* footnote 43 above.

ensure that the public participation proceedings in the future are accessible to the entire population, including translating the questionnaires into additional languages.

To summarize, I reiterate and clarify that innovation, in my view, is not an objective in itself, but rather, is an essential tool for improving and updating our work methods.[57]

The technological era also affects the relations between the State Comptroller and the audited bodies. What are the challenges in this respect, and how is the Office of the State Comptroller contending with them?

As stated, the technological era also poses challenges in the interface between the State Comptroller and the audited bodies. Information is one of the foundation stones of state audit and of the work of clarifying public complaints. Without full, comprehensive and reliable information from the audited bodies, professional and effective audit is not possible. Accordingly, a constitutional provision was fixed whereby audited bodies are required to release various types of information to the State Comptroller without delay, and any additional material that, in the Comptroller's opinion, is required for the purposes of the audit.[58] In the past, most information was physically filed in binders, and the audit employees used to examine them when they going to the audited entity. In recent years, as part of the technological revolution, most information is created, managed and stored through computers. This fact poses challenges for the Office of the State Comptroller but, at the same time, also provides us with opportunities to improve and enhance the audit.

Among the challenges, there is the difficulty involved in using email inboxes at the workplace, which contain both work-related emails and personal emails. There are entities that believe that the rule established in the **Isakov** case[59] – which typified the difficulty in this regard and prescribed restrictions on the employer's ability to peruse an employee's email inbox that is used for both professional purposes and for personal purposes – also applies to the relations between the State Comptroller and the audited entity, but that is not the case. As stated, the State Comptroller has broad constitutional authority. Therefore, audited bodies must enable the State Comptroller to have full access to all information stored on their computers, subject, of course, to our Office's procedures in this regard – among other things, the safeguarding of privacy, proportional searches according to key words, and the presence of an employee of the audited entity at the time of the search – which attest to the self-restraint that the State Comptroller imposes on himself.

57 Joseph Haim Shapira, *id.,* footnote 47.

58 Basic Law: The State Comptroller, Section 3.

59 Civil Appeal 90/08 *Isakov vs. the State of Israel – The Commissioner for the Employment of Women Law* (published in Nevo, February 8, 2011) (Hebrew).

In the spirit of this era, within the framework of the audit work, the Office must also ascertain whether the audited bodies are also putting emphasis on the methods for saving, documenting and backing-up email messages and messages between cellular devices that are transmitted during the routine course of work, and on the transparency of these actions. Sometimes, these types of correspondence, particularly if sent at the ministerial echelon, can reach the level of an actual decision. Although it would be appropriate for these decisions to be reached and made transparent to the public, they remain known solely to the decision-makers. One way to regulate this is by encoding these email addresses and storing them automatically on the ministerial network. I am sure and confident that the "high-tech nation" will find a way to regulate this issue, if the need to regulate it will be unequivocally determined.

As stated, the new reality also offers advantages. The information search and locate capabilities and the ability to retrieve lost information have improved the capabilities that were at our disposal during the "paper era" considerably. Furthermore, the use of computerized information enables us to perform a more effective examination of information encompassing entire populations and – through smart searches in "search engines" enabling the use of search words, information segmentation and the production of statistical data, graphic presentation of information, etc.[60] – thereby improves the quality of the audit.

To contend with this challenge and to optimally exploit its inherent advantages, immediately upon taking office, I instructed the Office administration to adapt our work to a changing information systems environment. I also instructed that all the technological infrastructure in our Office be upgraded. At that time, not all our employees were connected to the internet, which is an essential work tool in the field of audit. The information and inquiry management systems were also outdated. Within a short timeframe, comprehensive upgrading was performed in these areas, and today, the Office of the State Comptroller operates more advanced infrastructure and is continuing to upgrade them and adapt them to today's needs. Additionally, the activities of the *Hochma*[61] Forum were resumed in our Office. Our employees underwent and continue to undergo training in performing audits using computerized tools. Alongside adapting the Office's work internally to technological advances, we are also examining how the audited bodies are functioning in terms of managing the information systems under their responsibility.[62]

60 See, for example: use of audited bodies' information bases by the State Comptroller's Office: The State Comptroller: "Recruiting and Employing Relatives and Close Associates in Corporations," Annual Report 65A (2014).

61 *Hochma* – a Hebrew acronym for "Strengthening and Assimilating Computerized Tools in State Audit."

62 For example: "Examining the Management and Saving of Electronic Records in Government Ministries" and "Development and Maintenance of Information Systems in the Technologies Administration in the Israel Police": State Comptroller, Annual Report 66C for 2015 and for Fiscal Year 2014 Accounts (2016).

Naturally, this challenge also affects the contents of the audits and not just the means available to us. Recently, the Office of the State Comptroller has also been examining how the State is contending with cyber challenges and with additional technological threats, and the variety of risks in cyberspace.[63] Just recently, an extremely important report was published (partially) that addresses the State's coping with a new challenge that is a product of technological advancement, this time in the form of drones.[64] Additionally, at the beginning of 2017, we held a professional international conference in Jerusalem on the subject of how audit institutions around the world are contending with cyber challenges.

Another challenge that affects the work of the State Comptroller greatly is the social changes in the social network era. How does this social development actually affect the Office's work and how is the Office contending with the changes deriving from this?

The impact of the technological revolution on communications and on information management is leaving its mark on society as a whole. Social networks have become the modern-day, virtual version of the "town square." Mass demonstrations are organized in this virtual square that evolve into demonstrations in physical city centers. This phenomenon is not unique to Israel and is transpiring throughout the world.[65] Although the demonstrations that took place in Israel with the outbreak of the social protest during the summer of 2011 have already ceased, the protest is still ongoing, and it heralds the beginning of a social era with unique characteristics deriving from the ability to share ideas and opinions very easily.

The new situation prevailing in the social networking era is generating a real change in the relations between the people and the political leadership. The standing and authority of elected officials and public servants have been eroded. The public is demanding to be involved in decision-making processes on a regular basis and not only during elections that are held once every few years. Under these circumstances, the public is demanding full transparency of information and is seeking to become an active partner in decision-making. Within this context, the publication of the findings of Israeli state audits serves the public's right to know, which is an essential precondition to exercising freedom of expression in a democratic society.[66] The public expects its elected officials to use technology to improve

63 Metaphoric term for the domain where computer systems and computer networks store electronic data and online interactive communications are maintained regardless of the location of the users (from Wikipedia).

64 The State Comptroller, SPECIAL REPORT – NATIONAL PREPAREDNESS FOR DEFENSE AGAINST THE DRONE THREAT (2017).

65 For example: the "Green Revolution" that broke out following the elections in Iran in 2009; the "Jasmine Revolution" in Tunisia in 2010; and the "Lotus Revolution" in Egypt that led to the ousting of Egyptian President Mubarak, after 30 years in power.

66 See also: Appeal of an Administrative Petition 6013/04 *State of Israel, Ministry of Transportation vs. Israel News Company Ltd.*, 60(4) court ruling 75 (2006), which states: "Without information, there is no opinion, without an

the quality of life. These demands reflect the public's demand that its rights be exercised and fulfilled, both its civil and political rights and its social–economic rights.

The recognition of the importance of transparency,[67] alongside the standing of the State Comptroller and the considerable confidence that the public has in this institution, as has been expressed in several surveys conducted in recent years, including a survey by the Israel Central Bureau of Statistics,[68] enables the State Comptroller to also serve as an example of the appropriate way to act in this field, in terms of "following the rules without questioning them."[69] As part of this trend, we led a process of drafting a Code of Ethics for the Office of the State Comptroller and Ombudsman. We also instituted a "Lighthouse of Transparency" and, within this framework, we added a "transparency" tab to the Office's website, in which considerable information is published about the Office of the State Comptroller, such as details about the internal audit of the Office of State Comptroller, details about work-related travel abroad by Office personnel, reports pursuant to the Freedom of Information Law and the Office's budget. Recently, I initiated a decision to also publish my appointment schedule.

I am fully confident that the measures that I instituted relating to transparency will increase the public's confidence in the institution of State Comptroller.

In recent years, your office has increased its activities in the international sphere. We would be delighted if you would elaborate on this, and we would like to know what benefits you believe that the office gleans from this.

National supreme audit institutions operate throughout the world – magnificent institutions, ombudsman institutions and portfolios, and international overarching organizations in the fields of state audit, complaint clarification and whistleblower protection. These institutions and organizations together promote shared values and serve as fertile ground for mutual learning and professionalization.

During the tenure of State Comptroller Lindenstrauss, relations between the institution of the Israel State Comptroller and Ombudsman and international institutions grew stronger. It is also worthy to note his tremendous contribution to the establishment of a new

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opinion, there is no expression, without expression, there is no persuasion, without persuasion, there is no coping, and without coping, there is a concern that the truth will not come to light."

67 In the spirit of the statement coined by Judge Louis Brandeis, a Supreme Court Justice in the United States: "Sunlight is said to be the best of disinfectants, while electric light is the most effective policeman." (1914).

68 According to a survey conducted by the Central Bureau of Statistics, published on July 10, 2016, 60% of the public express confidence in the State Comptroller (second place among state institutions, after the IDF). (See: www.cbs.gov.il/reader/newhodaot/hodaa_template.html?hodaa=201619207).

69 Talmud Bavli, Tractate Rosh Hashana, 20, 1. [The literal Hebrew translation is "when you see it this way [the moon], sanctify it."]

ombudsman organization – Association of Mediterranean Ombudsmen (AOM). At the end of State Comptroller Lindenstrauss' incumbency, the Israel State Comptroller and Ombudsman was a member of several key international organizations in these fields.[70]

At the beginning of my term, I decided to continue to promote these relations and enhance our Office's involvement in the routine activities of these organizations, since, in order to generate substantive professional benefit, membership "on paper" in these organizations is not enough. Therefore, I initiated substantive activities and cooperative efforts that led, and that will continue to lead in the future, to mutual learning and to intensifying the Offices' research and development in both the field of state audit and in the field of clarifying public complaints. Since participation in international conferences is fruitful and inspiring, I try to send employees from the professional echelons to these conferences, so that not only will they learn from their colleagues from around the world, expand their knowledge and enhance their audit work, but also to enhance our Office's professional image in the international arena.

Although we have not yet chronologically reached the summary stage, several important achievements relating to the Office's international activities may be mentioned here: during the EUROSAI Congress held in Holland in June 2014, I was elected to the office of Comptroller of the European Organization of Supreme Audit Institutions until 2017, in conjunction with the State Comptroller of Croatia. Our office was also elected a member of the Task Force on Audit and Ethics. The mandate of this task force was extended by three additional years during the EUROSAI Congress held in Turkey in May 2017. It should be noted that, during that same congress, our Office also won an award for reaching first place in an international video competition held by EUROSAI on the subject of ethics. In 2016, our Office was also elected a member of the EUROSAI Task Force on Municipality Audit.

The Office of the State Comptroller also participated in a simultaneous audit on the subject of air pollution organized by EUROSAI in 2016 and in 2017, in which quite a few supreme audit institutions participated and performed simultaneous audits on topics relating to air pollution.

In 2015 and in 2017, our office hosted two of the most significant conferences of international organizations:

In 2015, our Office hosted EUROSAI YES 2.0 – The Second Young EUROSAI Conference, which addressed the subject of SAI&I. The heads of supreme audit institutions of several

70 INTOSAI International Organization of Supreme Audit Institutions), EUROSAI (European Organization of Supreme Audit Institutions), ASOSAI (Asian Organization of Supreme Audit Institutions), IOI (International Ombudsman Organization), AOM (Association of Mediterranean Ombudsmen).

countries participated in this conference, headed by the president of EUROSAI (the president of the Court of Audit of Holland).

In April 2017, the Office of the State Comptroller hosted a special international seminar on the subject of how state audit institutions are contending with cyber challenges, called: "National Threats & State Audit – Special Seminar for Heads of SAIs." Heads of supreme audit institutions and other executives from these institutions from 13 countries participated in this seminar, including the state comptroller of the United States, the president of EUROSAI, the secretary-general of INTOSAI and the secretary-general of EUROSAI.

In addition to all that stated above, our Office periodically hosts private delegations of various audit institutions from around the world and, at the request of the Israel Ministry of Foreign Affairs, we also host delegations from the United Nations and government authorities of countries that have diplomatic relations with Israel.

At the conclusion of an international activity, representatives of our Office who participated in the activity prepare a summary of the highlights. This summary is disseminated among all employees in our Office for the purposes of sharing the information and the know-how acquired during that activity and of assisting in improving the office's professional research and development capabilities. Not infrequently, our Office has adopted ideas proposed by our employees after having participated in international activities, such as strengthening the planning processes for performance audits; using infographics in audit reports and in ombudsman reports; involving the public in the audit process; and establishing an innovation lab in our Office.

Within the framework of the policy of strengthening the cooperation in the international arena, we are striving not only to have representatives of our Office participate in the various international activities, such as conferences and seminars, but also to have them present our Office's activities and its unique character (as the Office of the State Comptroller and Ombudsman). As a result, during most of the international activities in which employees of our Office participate, they also present lectures and distribute professional material about our Office. Considering the prominent professional standing of our Office in the international arena, our Office has translated and disseminated reports among the various organizations that were written by our Office and have considerable public importance, summaries of our Office's activities relating to the protection of whistleblowers, articles on various professional topics and more.[71]

71 Ombudsman – Annual Reports 39 and 40 (2012 and 2013) and selected chapters (2015); the Handling of Prolonged Interministerial Disputes (2013); Audit Report on Disengagement; the Treatment of Minors without Civil Status in Israel; Integrating Students with Special Needs in Regular Education Institutions (2013); State Audit and Human Rights (2014); Food Wastage – Social, Environmental and Economic Implications (2015); Education for a Shared Society and Prevention of Racism (2016).

In your opinion, what is the standing of the State Comptroller and Ombudsman within the framework of the Israeli government?

In 1988, the Basic Law: The State Comptroller was enacted. This law constitutes recognition of the constitutional standing of this institution as a separate quasi-governmental authority. The Basic Law anchored the State Comptroller's broad authority and delineated the wide scope of the bodies that the Comptroller audits. These attest to the importance that the State of Israel attributes to the existence of a national institution for state audit and clarifying complaints, as an integral part of the governmental system in Israel. The broad authority that the law confers on the State Comptroller enabled, on the one hand, safeguarding the independence of the audit and the State Comptroller's flexibility in choosing the topics and contents of the audits, which is essential for the purpose of maintaining relevant and effective auditing. On the other hand, it requires all state comptrollers to conduct themselves with self-restraint and with considerable fairness towards the auditees, to be diligent about both minor infractions and serious infractions, and to maintain the high standards of professionalism of our Office's employees. After more than five years in Office, I can wholeheartedly say that the employees of the Office of the State Comptroller and Ombudsman are outstanding professionals possessing personal integrity and professionalism. They consider their work a mission intended to benefit all citizens and residents of Israel.

Recently, there have been calls to limit the authorities of the State Comptroller and Ombudsman, inter alia, due to the allegation that the State Comptroller is exceeding the authority conferred on him by law and is interfering in political issues. What is your position in this regard?

My position is that, just like it is the duty of state comptrollers to safeguard the independence of this institution, alongside diligence with regard to the logical and restrained exercise of their authority, it would be appropriate for the audited bodies and other government authorities to also safeguard the standing of the institution of the State Comptroller. Indeed, the institution of State Comptroller and Ombudsman has recently been exposed to an unprecedented attack with regard to its standing as a gatekeeper and with regard to the scope of the authority delegated to the State Comptroller. This battle goes beyond the natural tension that exists between the Legislative Authority, the Executive Authority and the gatekeepers – particularly the Judicial Authority – and the institution of State Comptroller. One must keep in mind that the role of gatekeepers is to ensure that government power is used within the purview of the holders of government power, and according to values that are protected by law and are shared by all citizens and residents of Israel. Precisely at times of enhanced audit effectiveness, one must recall that the Basic Law: The State Comptroller expressly prescribes these values that the State Comptroller –

as a gatekeeper – is mandated to protect, and they are: "the legality of the actions, the moral integrity, the good governance, the effectiveness and economy of audited bodies, and any other matter that he deems necessary." The State Comptroller is also responsible for auditing elections and the funding of political parties. Also imposed on him is the task of examining the implementation of the rules to prevent conflicts of interest among ministers and deputy ministers. I also reiterate that the importance of audits, also those being conducted in real time, is for the long term. Even if the audit contents are sometimes not convenient for this or that auditee, measures that might disrupt the set of checks and balances between the various government authorities, including any that might undermine the standing and authorities of the institution of the State Comptroller, should not be taken. Any change, if made, must be based on dialogue and should be carried out while weighing all of the requisite public considerations.

I also disagree with those who believe that, in recent years, the Office of the State Comptroller expanded its purview too much and became involved in decision-making and policy-setting proceedings. For the most part, audit is conducted retrospectively. Real-time audit is conducted in a measured way, in line with the State Comptroller's decision and only in special circumstances when the public interest requires an audit of particular matters while they are happening – in order to prevent the failing from continuing or to rapidly rectify it.[72] The purpose of real-time audit is neither to delay or discontinue the activities of the audited entity, nor is it to substitute for decision-making by the directors of the audited entity. Therefore, audits conducted in real time also do not interfere in the decision-making process and do not issue directives to the audited bodies. Naturally, employees of the Office of State Comptroller maintain constant contact with many audited bodies for the purposes of keeping abreast and collecting information for audit purposes, and this is also true for bodies for which an audit is not carried out according to the annual workplan. Furthermore, the State Comptroller receives considerable information each year from the public about all the audited bodies, and it expects that this information will not be swept under the rug. When the Audit Institution receives information from the public, or when the Audit Institution identifies "warning signs" as an observer on the side, it has no other choice but

72 Real-time audit has also been conducted in recent years. Within this context, we note, inter alia, the report on "Operation Protective Edge" (a portion of which was published as a special report in February 2017, another has not yet been published, and a third part is privileged); State Comptroller, Special Report – National Preparedness for Defense Against the Drone Threat (2017); State Comptroller, "Regulation of Collective Nursing Care Insurance Policies, Annual Report 68A (2017); the report on the subject "Privatization of Israel Military Industries Ltd. (not yet published), and a report on the subject "The Government Companies Authority – Appointment of Independent Auditors to Government Companies" (not yet published). Furthermore, sometimes a real-time clarification is performed, such as clarifying the complaint about boulders falling from Mount Gilboa into homes in the communities of Heftziba and Gidona (case no. 908018), the clarification of complaints about the lack of adequate handling of the phenomenon of dogs roaming in communities adjacent to the border (case nos. 1006406; 1014191; 1024037; 1028438 and 1024442).

to conduct a real-time audit. In this way, the State Comptroller can prevent injuries to persons, significant damage to the public treasury and adverse impacts on the rule of law.[73] There are a plethora of examples of real-time audits that have been published over the last decades. These examples show that state comptrollers have used these means in a logical and restrained manner.[74] One should keep in mind that, for many matters concerning the public sphere, there is not always a directly injured party who will bring his complaints to the court and, in some instances, there also is no relevant public petitioner. In these instances, the court is not the effective authority that can protect the public interests. In the absence of an injured party who refers to the courts as stated, real-time intervention by the State Comptroller, based on information he received about serious deficiencies that require immediate intervention, is the most effective way to protect the public interest and prevent corruption or grave irreversible damage originating from an essential defect that was identified.

I clarify that, even recently, I sometimes feel like the Roman senator Cicero, standing opposite the College of Pontiffs and presenting his speech in defense of his land (*Oratio De Domo Sua ad Pontices*), only my battle is for the continuing existence of an independent State Audit, for the purpose of preserving the democratic robustness of the State of Israel. The institution of the State Comptroller is not the home of this or that comptroller, but rather is an institution that is carrying out a public mission. Therefore, I hope and pray that the winds will calm down and the Audit Institution will be able to continue carrying out its mission without any concern about harm to its independence.

73 See, within this context, the statements of Dr. Oren Shabat, ADMINISTRATIVE PETITION AND RELIEFS IN PUBLIC TENDERS, 181 (2017), whereby, without a real-time audit being conducted, "the State Comptroller's influence on the propriety of public tenders is limited."

74 Following are a few examples: In 1984, State Comptroller Yitzhak Tunik, OBM, published a real-time audit on the issue of regulating bank shares, a crisis that occurred only towards the end of 1983; in 1987, State Comptroller Tunik, OBM, published a real-time audit on the mode of execution of the Lavi aircraft project. As is known, the said project was discontinued, inter alia, as a result of the publication of the findings of the audit report; in 1991, even before the outbreak of the Second Gulf War, and even before the public needed to use the emergency protection kits, the State Comptroller at that time, Miriam Ben Porat, OBM, published an audit report that stated that immediate action must be taken to increase the production of the emergency protection kits and to replace the existing kits due to defects in the protection that they provided; in 1993, State Comptroller Ben Porat, OBM, published a real-time audit report on the subject of the sale of bank shares; in 1999, State Comptroller Eliezer Goldberg published a report on the authorities' preparedness for "the Y2K Bug," and the highlights of the findings were brought to the attention of the audited bodies already back in 1998; State Comptroller Micha Lindenstrauss conducted real-time audits of several issues, including an audit of the Wisconsin Plan (State Comptroller, Some Aspects of the Welfare-to-Work Plan [Wisconsin Plan"], May 2007), an audit of the functioning of the home front during the Second Lebanon War (State Comptroller, Preparedness and Functioning of the Home Front during the Second Lebanon War, July 2007), and an audit of the disengagement process (State Comptroller, Audit Report on the Disengagement – Issues in the Activities of the SELA Administration [assistance to settlers in the Gaza Strip and in northern Samaria], Preparedness of the Local Authorities and Absorption of the Evacuees, March 2006); for elaboration, see: Boaz Anar and Leora Shimoni, *The Contribution of the State Audit*, Iyunim – Studies in State Auditing, Journal 62, 185 (2011).

It is important to state that although the attempt to increase the effectiveness of the audit poses new challenges for the Audit Institution, I have not found that the extent that recommendations of the Ombudsman have been honored and carried out has diminished. Today too, the audited bodies are warmly and willingly accepting nearly all the Ombudsman's recommendations. As a result, the service that citizens are receiving from the various state authorities is improving. This facilitates the strengthening of the public confidence in both the institution of the Ombudsman of Israel and in the various authorities with whom he comes in contact. The confidence of Israeli citizens and residents in the Ombudsman, the knowledge that they can lodge a grievance, and the honoring of the Ombudsman's decisions on the part of the audited bodies – can all sometimes prevent superfluous frictions between citizens and authorities.

How is the strengthening of the effectiveness of the Office of the State Comptroller being expressed?

In recent years, the Office of the State Comptroller has exposed many deficiencies that changed the reality, in both the field of economics and in the field of civil rights, some of these concerned the strengthening of the rule of law and some led to the identification of personal failures and to dismissals of those involved.

In the field of protecting individual rights, one can mention the contribution of the Office of the State Comptroller to extending the trial period of the biometric database pilot.[75] In this matter, the Office of the State Comptroller did not take a position on the question of whether it is appropriate to establish the biometric database, since at issue is a decision in the domain of government policy. The Office of the State Comptroller examined the significant deficiencies in the way that the pilot was carried out, about the concern about material infringements on the basic rights of people whose personal information will be saved in the database, and about the fact that it is not possible to make an informed decision as a result of these deficiencies. Considering the position of the Office of the State Comptroller, the Interior Minister decided to extend the period of the pilot.

Another example is in the field of communications. An audit by our Office identified numerous shortcomings in the relations between Bezeq Corporation and the Ministry of Communications. As a result, a comprehensive, widescale report was published in which we emphasized, inter alia, the importance of building proper work processes, inter alia, to avoid

75 State Comptroller, SPECIAL REPORT – NATIONAL BIOMETRIC DOCUMENTATION – THE TRIAL PERIOD (2015).

a situation of "regulatory capture."[76] As a result, the revoking of the structural separation in the fixed-line communications market was suspended.

In the field of moral integrity, the Office of the State Comptroller brought about the dismissals of executives from their offices in various bodies, including chairmen of boards of governors, presidents and CEOs of educational institutions, directors-general of government companies, the chairman of the board of a government company and mayors of cities and councils.

It is also noteworthy that as a result of preparing drafts of the audit reports, changes were made on the ground even before the final report was published. One example of this is the removal of the candidacy of a person for the role of general manager of the Chief Rabbinate as a result of shortcomings presented in the draft of the audit report.

Another example is a situation of law enforcement in the Mevu'ot HaHermon Regional Council.[77] Our report on this council reported findings of significant failures relating to business licensing. According to the council's data, in October 2014, 192 businesses requiring licenses were operating within its jurisdiction, out of which 120 (about 62%) had no business license, while the examination performed by the Office of the State Comptroller, about the businesses operating in various fields, found that 307 businesses were not registered in the council's database; 261 poultry farms, four gas stations, 29 lodging businesses and 13 food businesses. Another troubling finding was that only one out of the 262 poultry farms within the council's jurisdiction held a business license. Even before the audit was completed, the head of the council began changing the situation from the top down and began effectively enforcing the law.

The audit findings relating to the mode of functioning of the Local Planning and Building Committee in Samaria also generated material changes[78] in the work processes for receiving permits[79] – even before the report was published.

76 State Comptroller, Special Report – Aspects in the Activities of the Ministry of Communications to Regulate the Fixed-Line Communications Segment – Implementing the "Wholesale Market" Reform; the Investment in Infrastructure in the Fixed-Line Communications Segment and Structural Aspects; Conflicts of Interest of the Prime Minister in his Capacity as the Minister of Communications (2017).

77 State Comptroller, *Mevu'ot HaHermon Regional Council*, Reports on Audit of the Local Government for 2015 (November 2015).

78 A district committee that has more than one local authority residing within the local planning district under its jurisdiction: the communities under the committee's responsibility – Or Akiva, Binyamina, Giv'at Ada, Jisr az-Zarqa, Zichron Ya'akov and Fureidis.

79 Additional examples that attest to the effectiveness of the audit: State Comptroller, "Non-utilization of Social Rights," Annual Report 65C (2015), one of the shortcomings described in the report was that according to the assessment of the National Insurance Institute itself, about NIS 670 million were not transferred to those entitled to a military reserve duty benefit; however, the report stated that "if we include in the calculation the data about non-utilization of the military reserve duty benefit, according to the assessments of the National

To encourage the rectification of deficiencies even during an audit, as part of strengthening the effectiveness of the audit, I set a policy whereby, when an auditee "changes its ways" even during the audit, this will be reflected in the report itself and, in special circumstances, a positive note of this will be made ~~favorably~~, as dictated in section 15(b)(4) of the law.

Does the State Comptroller believe that strengthening the effectiveness of the audit contributes to strengthening the public's confidence in the institution of State Comptroller? If you do, how does strengthening the public's confidence affect the standing of the institution of State Comptroller among the government institutions?

I believe that there is a direct correlation between the effectiveness of the audit and the confidence that the public has in the institution of the State Comptroller, and vice versa – between the confidence that the public has in the institution of State Comptroller and the strengthening of the effectiveness of the audit, and both of these reflect the standing of the State Comptroller among the State's institutions.

The Office of the State Comptroller does not have enforcement authority but, as stated by the Supreme Court, "[a]t issue is not a weak spot, but rather a source of the State Comptroller's power."[80] So that the absence of enforcement authority to not become a weak spot, it is critical that the audited bodies accept the State Comptroller's comments as professional comments free of any bias, which derives from the independence of this institution.

Thanks to the confidence that the audited bodies have in the professionalism of the Office of the State Comptroller, they conclude that it is conducting effective audits of the various

Insurance Institute, then the value of the monetary rights that were not transferred as is required to those entitled, *prima facie*, reaches about NIS 1 billion." As an outcome of the publication of the findings of the said report, substantial sums of money were refunded to reserve soldiers; following the publication of the findings of a report on the subject of "Food Wastage – Social, Environmental and Economic Implications," Annual Report 65C (2015), the Ministry of Agriculture instituted quite a few significant actions and it is still continuing to take action in this regard and, inter alia, included the topic "Preventing Food Wastage" in its list of targets for 2016, and issued a procedure for destroying agricultural produce surpluses in coordination with the Plant Council; the Ministry of Education added content on the subject of preventing food wastage in the curricula and in teachers' continuing education courses, and promoted the draft bill "Encouragement of Food Rescue, 5775–2015," and the IDF significantly increased the quantities of food that it donated to food NPOs. The IDF changed the method for reserve duty call-ups; as a result of the publication of the findings of a report on the subject of "Assistance in Housing for Eligible Persons (Public Housing), Annual Report 65C (in May 2015), massive activities were carried out in the Ministry of Housing and the eligibility criteria for public housing were updated. As a result, by September 2015, 300 families received housing in apartments that had stood vacant; following the publication of the findings of a report on the subject of "Utilization of the Tax Benefits, and Service to Taxpayers," Annual Report 66A (2015), several shortcomings were rectified in the handling of the blind, purchase tax benefits were granted to the disabled, and certificates were issued.

80 HCJ Petition 3989/11 *Movement of the Trustees of the Temple Mount in Israel vs. the Knesset Committee for State Audit* (published in the computerized database, 27.12.2012).

government authorities and they adopt the conclusions in its reports, and this enables improvements in the service to the public. In this way, the audits contribute to strengthening the public's confidence in the public service as a whole.

Naturally, the more the public has confidence in the institution of State Comptroller, the more diligent the audited bodies will be in rectifying the deficiencies, in order to win the public's confidence.

It turns out, therefore, that at issue are interconnected vessels, and therefore, there is a direct correlation between the confidence that the public has in the institution of the State Comptroller and the increased effectiveness of these reports among the audited bodies.

Obviously, as a result of the increased effectiveness and relevance of the audits, the number of requests to hold a hearing prior to the publication of the report has increased, in addition to the written response to the draft report. Often, the auditees arrive at these hearings accompanied by lawyers to represent them and high-level accountants, in order to properly contend with the findings of the audit. I have instituted a policy whereby audited bodies that request to supplement their response to the report also orally can meet with me and my professional staff and voice all of their arguments. I consent to these requests because of the importance that I attribute to the practical relations between the Office of the State Comptroller and the audited bodies, and to the mutual respect between them. I point out that the possibility of holding a hearing before me is given not only to the heads of the audited bodies, but also to any employee who is concerned about harm to his reputation, whether his name is expressly mentioned in the draft audit report or whether it is possible to identify him merely by his job description. As I already pointed out, I constantly uphold the value of showing fairness towards every auditee during an audit.

The stronger that the institution of State Comptroller and Ombudsman becomes, the louder become the pleas about the State Comptroller not being subject to audit; to quote those raising the plea: "Who is auditing the auditor?" Is there anything to this argument?

Back in the day when I was a young lawyer, I appeared before a judge and I fervently presented a plea that was innovative. The judge listened with great attentiveness to my pleadings and, in the end, he said to me: "Advocate Shapira, your pleadings are captivating, but I cannot entertain them." The allegation that the institution of State Comptroller is not subject to audit is an appealing one, since naturally, the Comptroller cannot conduct an audit of his own office and, therefore, the Office of State Comptroller does not audit itself. Nevertheless, anyone who deduced from this that there is no entity that audits the auditor is incorrect and, for the most part, this allegation is voiced by parties seeking to diminish the independence of the Office. In practice, the institution of the State Comptroller is subject to

audit by an internal auditor, by the Knesset, by the Judicial Authority, by the media and by the general public.

Speaking to the merits of the question, I will say that the Office of the State Comptroller has been conducting internal audits for many years already, through an external independent audit firm that specializes in conducting internal audits. Without mentioning names, I will say that, in an extraordinary manner – following the publication of the State Comptroller reports, two deputy directors-general finished working within a few years. One of them left office under circumstances that, in other offices, it is doubtful that they would have done anything about the issue but, according to the approach of the State Comptrollers, employees of the office, and particularly its managers, must conduct themselves according to the most stringent norms of conduct applicable to public service. The power of internal audit originates from both the importance that the Office attributes to it and from the many inputs invested in it.

Not only is the Office subject to internal audit, it is also subject to audit by the Knesset. The Office's budget is submitted for approval by the Knesset Finance Committee, and the State Control Committee supervises both the Office's professional activities and its budget expenditures, and a report in this regard is submitted for the committee's approval.

About a year ago, another layer was added to the audit of the Office of the State Comptroller and Ombudsman, with the enactment of Amendment 49 to the State Comptroller Law. This amendment prescribes that any employee of the Office of the State Comptroller who claims that he is being harassed as a result of exposing an act of corruption, a serious violation of law or a serious violation of good governance committed in the Office of the State Comptroller and Ombudsman can petition for a protection order through the Speaker of the Knesset. Under such circumstances, the Speaker of the Knesset will appoint a retired judge of the Supreme Court or of a district court, after consulting with the president of the Supreme Court, and this judge will be have all the authority conferred on the Ombudsman regarding clarification of complaints, including the issuance of a protection order.

Decisions of the State Comptroller are, of course, also subject to judicial review. More than once, auditees have appealed to the High Court of Justice against the State Comptroller's decisions, and the Supreme Court examined the way in which the State Comptroller exercised his authority. These petitions were filed in relation to matters pertaining to state audit and also in relation to matters pertaining to the State Comptroller's role as Ombudsman, particularly in relation to the mode of exercise of his authority to protect whistleblowers.

The Office of the State Comptroller also ranks high on the list of government institutions in Israel in terms of the transparency of the economic data that it presents to the public. Through the "transparency" tab on our Office's website, we make as much information accessible to the public as possible and we publicize, inter alia, the Office's budget, the report on budget expenditures, data about the wages of the Office's employees, information about all work-related travel abroad, beginning with my (infrequent) travels and ending with the travels of the last of the employees, as well as my appointment schedule. These data enable the public and the media to serve as another effective audit source. And indeed, besides the Israeli media's coverage of audit report findings, more than once, the coverage addressed allegations about the Office's, the Comptroller's and of the employees' methods of operation. I am happy that, to date, there has not been any substance to these allegations, but the mere fact that they are being raised and discussed by the media attests to my Office's openness to public criticism.

In this regard, I will say that it is customary for state comptrollers' offices around the world to conduct audits of each other, a proceeding that is called "peer review." At the beginning of my term, our Office participated with other audit institutions in a peer review task of the office of the Comptroller General of Chile, and recently, we have been examining the possibility of conducting a peer review in our Office, even though at issue is a complex proceeding that also entails considerable costs.

I believe that the various audit layers that I specified utterly refute the allegation that the institution of State Comptroller is not subject to audit. On the contrary, this institution is subject to substantial and effective audit, as it should be.

Summary

During the first year of my term, many significant reports were published that attest to the implementation of my policy to integrate the battle against corruption and the safeguarding of moral integrity and the placing of considerable emphasis on the economic–social dimension, advancing weak populations and protecting human and individual rights in Israel.[81]

Since the beginning of my term and to date, I have been taking action to improve and streamline the audit and public complaint clarification proceedings, while adopting innovative approaches. As stated, during an era of social and judicial changes, the institution of State Comptroller and Ombudsman must continue to adapt itself to the

81 For example: State Comptroller, OPINION – CONTROL OVER FOOD PRICES AND CONTROL OVER DAIRY PRODUCT PRICES (2012); State Comptroller, Annual Report 63A (2012); State Comptroller, SPECIAL REPORT – BAR-ILAN UNIVERSITY (2012); State Comptroller, *Aspects of Advancing the Integration of Ethiopian Israelis – Essential Defects in Managing the National Plan*, Annual Report 63C (2013).

changing reality, in order to maintain the considerable confidence that the audited bodies and the general public have in this institution, and in order to continue performing its work in the best possible manner. This adjustment takes place at both the level of management, processing and making information accessible that has been collected and created through the Office's work, and at the level of the scope of the audit and the handling of public complaints. I believe that the annual reports issued recently prove that the Office of the State Comptroller is keeping in step with the times, is identifying deficiencies in government bodies' methods of contending with the challenges of the "technological era" and is giving expression to this in its reports,[82] and is working in conjunction with the Ombudsman Commission so that appropriate importance will be attributed to protecting human rights.[83]

The fundamental assumption underlying my worldview is that, without protecting human rights in their broadest sense – i.e., the rights of every person living in Israel – no just and civilized society, which does not content itself with simply abiding by the law, but also acts with compassion and refrains from excessive intransigence, can endure. We learned this also from the Jewish literary sources, as Rabbi Yochanan said: "Jerusalem was destroyed only because they judged according to Jewish law" and the *Talmud* explains that his intention had been "that they conducted their trials narrowly according to strict Jewish law and did not go beyond the letter of the law."

Indeed, the main arena in which human rights are shaped and anchored is the parliamentary arena; the Legislature must act within the constitutional frameworks prescribed in the basic laws and, during its activities, it must take action to promote and protect rights, and to refrain from infringing on rights that were recognized long ago. Nevertheless, alongside a strong Legislative Authority, a democracy needs strong and independent supervisory mechanisms. The Office of the State Comptroller and Ombudsman serves, similarly to the Judicial Authority, as this type of supervisory mechanism, and its activities as a professional authority that is sensitive to the fundamental constitutional values, contribute to the robustness of democracy in Israel.[84]

82 See, for example: State Comptroller, *Aspects of the State's Preparedness for Defending Cyberspace*, Annual Report 67A (2016).

83 The Ombudsman, Annual Report 42 for 2015 (2016).

84 Compare and contrast: regarding the role of the Supreme Court: Aharon Barak, *The Parliament and the Supreme Court – Looking to the Future*, Mivhar Katavim, Vol. D, 82 (2017) (Hebrew).

The State Comptroller and Human Rights in Israel*

Aharon Barak**

1. Human Rights in Israel

The State of Israel has a three-level system for protecting human rights against the government authorities. **The first level** is jurisprudential. Since the founding of the State, the Supreme Court has recognized a long list of human rights such as freedom of occupation,[1] liberty,[2] freedom of expression,[3] the rights of association,[4] and of demonstration.[5]

The second level is statutory. The Knesset has recognized human rights in legislation, the most important of these being equal rights for women, equal employment opportunities, and the right to privacy.[6]

The third level, which is the one I shall be focusing on in this lecture, is constitutional. These are the human rights that were (explicitly or implicitly) recognized by the Basic Laws of Israel, i.e., a series of constitutional laws adopted by the Knesset throughout its history. Most of these constitutionally protected rights are entrenched in the Basic Law: Human Dignity and Liberty, which recognizes the following rights as constitutional imperatives: the right to life,[7] the right to bodily integrity,[8] the right to human dignity,[9] the right to

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1 HCJ 1/49 *Bejerano v. the Police Minister* [1949] IsrSC 2 80, 82-83.

2 HCJ 95/49, *El Kuri v. the CGS of the IDF* [1950] IsrSC 4 80, 82-83..

3 HCJ 75/53, *Kol Ha'am Ltd v. the Minister of the Interior* [1953] IsrSC 7 871.

4 HCJ 241/60, *Kardosh v. the Companies Registrar* [1961] IsrSC 15(2) 80, 82-83.

5 HCJ 148/79, *Sa'ar v. the Minister of the Interior and the Police* [1980] IsrSC 34(2) 169; HCJ 153/83, *Levy v. the Commander of the Southern District of the Israeli Police* [1984] IsrSC 38(2) 393..

6 See Women's Equal Rights Law of Israel (5711 - 1951); Employment (Equal Opportunities) Law (5758 - 1998); Protection of Privacy Law (5741 - 1981).

7 Basic Law: Human Dignity and Liberty, 5752–1992, SH No. 1391, 150, § 2, 4.

8 *Ibid.*

9 *Ibid.*

property,[10] the right to personal liberty,[11] the right to leave and enter Israel,[12] and the right to privacy and freedom from unsanctioned intrusion.[13]

Human rights are to be interpreted using purposive interpretation.[14] This interpretation method endeavors to give the legal text a meaning consistent with the contemporary social objectives underlying the text. The interpretation should be undertaken with a "spacious view". It is not legalistic or pedantic.[15] It is practical and reflects the long-term views of Israeli society. In interpreting human rights, the Court looks at and draws conclusions from international human rights law and comparative constitutional law. These bodies of law are, of course, not binding on the Israeli Supreme Court. Indeed, the Court is guided by its own extensive jurisprudence regarding human rights, going back to the time the State was established.

Most Israeli constitutional rights are framework rights.[16] These are each comprised of a bundle of subordinate rights. They are "mother-rights", from which "daughter-rights" that reflect the various aspects of the parent right, are derived.[17] The most important of these rights is the right to human dignity, which encompasses the right to protection against any limitation of the humanity of a person as human being. Human dignity is a person's freedom to choose their autonomy of will. It is their personality, the "I" which ensures their identity as a human being. It is the individual's freedom to compose their life story and influence its contents; it is the freedom from humiliation and degradation; it is the principle that prevents a person from becoming a mere means for the satisfying of another's desires; it is a freedom which operates within society.

The mother right of human dignity includes the following daughter-rights: the right to personality, the right to equality, the right to a reputation, the right to freedom of expression, the right to freedom of conscience and religion, the right to education, the right to a family (such as marriage and parenthood), the right to employment, the right to health, the right to freedom of movement within the State borders, the right to due process, and the right to a dignified human existence. This is, of course, not an exhaustive list. The right to human dignity includes both civil and social subordinate rights; both the core and the

10 Basic Law: Human Dignity and Liberty, 5752–1992, SH No. 1391, 150, § 3.

11 Basic Law: Human Dignity and Liberty, 5752–1992, SH No. 1391, 150, § 5.

12 Basic Law: Human Dignity and Liberty, 5752–1992, SH No. 1391, 150, § 6.

13 Basic Law: Human Dignity and Liberty, 5752–1992, SH No. 1391, 150, § 7.

14 Aharon Barak, INTERPRETATION IN LAW, Vol. 3 – Constitutional Interpretation 285 (1994) (Hebrew).

15 *Ibid*, at p. 289.

16 Aharon Barak HUMAN DIGNITY – THE CONSTITUTIONAL RIGHT AND ITS DERIVATIVE RIGHTS, Vol. 1, 303 (2014) (Hebrew).

17 For the concepts of a parent right and a subsidiary right - see Aharon Barak, HUMAN DIGNITY – THE CONSTITUTIONAL RIGHT AND ITS DAUGHTERS, Vol. 2, 533 (2014) (Hebrew).

penumbra of human dignity are included within the set of daughter-rights and certainly within the parent right.

The right to human dignity imposes both a "negative" obligation on the State to refrain from limiting the right, and a "positive" obligation to protect the right from being limited by others.[18] The scope of the daughter-rights, such as the rights to equality and to freedom of expression, is different from what it would have been had they been recognized as independent rights. The daughter-rights are part of the bundle known as human dignity. Thus, the daughter-right to equality encompasses only those characteristics of equality which are connected to human dignity. Discrimination in a form that does not limit human dignity is not superseded by the daughter-right to equality, however, protection against such discrimination could have been included as a part of an independent right to equality, had such an independent right been recognized. All the constitutional rights, including those derived from the right to human dignity, are rights of the individual vis-à-vis the state authority. They do not directly apply to relationships between individuals.[19]

All the constitutional rights, including of course, the right to human dignity and its daughter rights, are relative. They are not absolute. The significance of this characteristic is that limits can be properly imposed on these rights, in appropriate circumstances. Such limitations will be constitutional only if they are within the range allowed by the principle of proportionality. According to the (express and limited) rules of proportionality, a statutory limitation of a constitutional right will be constitutional if it has been imposed for a proper purpose; if a rational connection exists between the realization of the proper purpose and the statutory measures taken; if the limitation is necessary because the proper purpose cannot be realized through alternative means that would be less harmful to the affected human right; and if there is a proper balance between the marginal public benefit generated or the right being protected by the statutory means adopted on the one hand, and the marginal damage to the constitutional right caused by such statutory intervention on the other hand.[20]

18 HCJ 6298/07, Rasler v. the Israeli Knesset [2012] IsrSC 265(3) 1. Para. 54, per President Beinish; see also *supra* note 16, at p. 347.

19 See, *supra* note 16, at p. 379.

20 Aharon Barak, PROPORTIONALITY IN JUSTICE – THE INJURY TO THE CONSTITUTIONAL RIGHT AND ITS LIMITATIONS, 419 (2010) (Hebrew).

2. The Protection of Human Rights in Israel

A. Normative Violations

Are constitutional rights properly protected in Israel? Are they being infringed upon or otherwise limited? In answering this question, we draw a distinction between normative limitations of constitutional rights and physical limitations thereof. A limitation is normative if it is entrenched in a sub-constitutional legal norm (whether a statutory or common law norm). The violation is physical if it is not entrenched in a legal norm.

Regarding normative violations, it should be noted that most of the new legislation in Israel enacted after Basic Law: Human Dignity and Liberty came into force, complies with the constitutional imperatives. Even where this legislation limits a constitutional right, in most cases it satisfies the requirements of the proportionality test. The paucity of Supreme Court petitions challenging the constitutionality of new legislation is not indicative of a restrictive approach on the part of the Court. To the contrary, it demonstrates the conscientious work undertaken by legal advisors, both in the Government and in the Knesset, for the purpose of ensuring that the Knesset does not enact legislation that infringes on any constitutionally protected rights in a disproportionate manner.

A different picture emerges regarding old legislation, i.e., laws that were enacted prior to the enactment of the Basic Law: Human Dignity and Liberty. A significant portion of this older legislation places restrictions on constitutionally protected rights in a manner which does not satisfy the proportionality principle. Thus, for example, the laws regarding marriage and divorce in Israel, which do not recognize civil marriage and divorce or civil unions, imposes disproportionate limitations on the right to a family, which is derived from the constitutional right to human dignity.[21] The Court is powerless to intervene regarding this matter, since the clause concerning validity of laws in section 10 of the Basic Law: Human Dignity and Liberty, provides as follows:[22]

> "This Basic Law shall not affect the validity of any law in force prior to the commencement to the Basic Law."

However, this restriction on the Court's ability to change the provisions of legislation does not apply to the legislature itself, which has the power, and in my opinion, the duty, to amend the old legislation in order to bring it in line with the constitutional rights. I find this situation to be regrettable, i.e., a situation in which, despite the language of the Basic Law:

21 Aharon Barak, *The Family Constitution: Constitutional Aspects of Family Law*, 16 Law and Business, 13, 50-54 (2013); See also, *supra* note17, at p. 632.

22 Basic Law: Human Dignity and Liberty, 5752–1992, SH No. 1391, 150, § 10.

Human Dignity and Liberty which provides that "[a]ll governmental authorities shall respect the rights under this Basic Law", little has been done in this context to correct the unconstitutional infringements contained within the older laws. "All governmental authorities" includes, first and foremost, the Knesset itself. The validity of laws clause does not release the Knesset from this duty to correct that body's past errors, even if the clause does prevent any direct judicial relief in this regard.

B. Physical Violations

There are numerous physical (i.e., non-normative) violations of constitutionally protected rights. In this regard, section 11 of the Basic Law: Human Dignity and Liberty provides that "[a]ll governmental authorities shall respect the rights under this Basic Law". As we have seen, the term "[a]ll governmental authorities" includes the legislature, as well as additional authorities, amongst them, the executive branch, the judiciary and the local authorities. Every statutory authority is a governmental authority. The State Comptroller is certainly "one of the government authorities".

The State and its enforcement entities must of course, maintain a system that ensures that the protection of the constitutional rights of the individual are protected against violations by the State's own authorities. Within the framework of judicial review over executive decisions, the Courts must of course adjudicate allegations concerning the infringement of the constitutional rights of people and citizens. The State Comptroller, in both his general capacity as the State auditor and as the Ombudsman, must ensure that constitutional rights are respected. Indeed, section 2(B) of the Basic Law: The State Comptroller, provides as follows:

> "The State Comptroller shall examine the legality […] of the bodies' actions."

This provision empowers the State Comptroller to examine whether the executive branch is properly protecting the constitutional rights of the individual vis-a-vis the State.

In my view, not enough protection is afforded under Israel's current structure. In many democratic countries in which constitutional rights are protected, that protection is secured through a functioning Human Rights Commission. The countries whose governmental systems provide for such a commission include Australia, the United States (in several of the individual states such as Massachusetts, and at a federal level, only with respect to the right to equality), the UK, Denmark, South Africa, New Zealand, and Canada (at both the Federal

and provincial levels).[23] These commissions play an important role in protecting human rights. They are engaged in various activities which the Court, the main defender of human rights, cannot be engaged. These types of activities include the initiation of hearings regarding human rights violations, and the promotion of human rights issues through the use of non-legislative or judiciary methods such as education, public relations, the collection of information and the expression of public positions. The idea of creating a statutorily enshrined human rights commission in Israel did arise during Yossi Beilin's tenure as Minister of Justice. Between 2000 and 2001, at Minister Beilin's request, a comprehensive and important research study on the subject was undertaken at the Hebrew University's Minerva Center, and a draft law was even prepared.[24] Most regrettably however, the bill was shelved. Today, the absence of the institution is conspicuous. However, even without a consensus on whether or not it can be viewed as an independent statutory authority, the work of such a commission can certainly be deemed to be part of the mandate of the Office of the State Comptroller and Ombudsman.

Thus, so long as legislation is not forthcoming regarding the creation of an independent human rights commission, the State Comptroller, both in his general audit capacity and as the Ombudsman, should regard it as his responsibility to function as the country's human rights commissioner. Indeed, one of the State Comptroller's mandates is to examine the activities of audited bodies to determine whether those activities have led to the infringement of constitutional rights. There is no difference in this context between the infringement of "civil" constitutional rights, such as the right to freedom of expression and to equality, and the infringement of "social" constitutional rights, such as the right to health and education.[25] Indeed, every constitutional right has a civil aspect. The infringements in question are engendered by both the over-activity of the State which threatens to undermine "negative" constitutional rights, and the under-activity of the State which fails to adequately protect "positive" constitutional rights.

The State Comptroller's activity in this area does not replace that of the Court, rather, it functions as an additional form of rights protection activity. It is not a substitute for judicial review, if only because it is not binding (although the assumption should be that non-compliance with the State Comptroller's recommendations is inherently unreasonable activity). It should also not be seen as an "alternative remedy" which must be exhausted before a petition may be filed in court. The State Comptroller's activity in the area of human rights is important because it is of wider scope than judicial activity can be.

23 *Human Rights Commissions and Ombudsman Offices: National Experiences Throughout the World* (Kamal Hossain et al., eds. 2000).

24 Proposed Human Rights Commission Law, 5766-2006, P/17/1561.

25 *Supra* note 17, p. 793; see also, Yoram Rabin, THE RIGHT TO EDUCATION, 304 (2002).

The Supreme Court does not evaluate the efficiency and wisdom of administrative decisions, but only their reasonableness. The Comptroller, in contrast, is empowered to examine "the orderly management, the efficiency, and the economy of the audited bodies".[26] Thus, in this context, the State Comptroller's audit is broader in scope than the Court's judicial review of reasonableness or of proportionality. Actions that are within the zone of reasonableness or of proportionality may still be activities that are deemed to be inefficient. Indeed, inefficiency in the protection of human rights is a subject within the purview of the State Comptroller's jurisdiction. Needless to say, the state audit itself is not immune from being subjected to judicial review. On a previous occasion, I explained the relationship between judicial review and the state audit function, as follows:[27]

> "The State Comptroller, in his capacity as Ombudsman, seeks effective justice, as do the courts. Like us, he is independent in his decisions, and he has no master other than the law. He performs his functions with fairness and objectivity, mindful of the importance of the mission with which he has been entrusted. Both the court and the Ombudsman seek resolution to disputes between the individual and the government authorities. We do not compete with each other. We are not envious of you. Quite the opposite: we shall be pleased to see you bolster and expand the state audit function, and to see you solve problems that, if they are not resolved, will find their way to us. The two institutions – the Court and the Ombudsman – act to impose the rule of the law. We are not competitors - rather, we complement each other."

Indeed, with regard to human rights, the more protectors there are, the better the situation will be. It is important to remember that without human rights there is no democracy, and we must all protect democracy. If we do not protect democracy, democracy will not protect us.

26 Basic Law: The State Comptroller (5748 - 1988), SH No. 30, § 2(b).

27 Aharon Barak, *On Values, Justice, and Democracy in Israel*, 59 *Iyunim* - Studies in State Audit, 21, 25 (2002).

The Role of the State Comptroller in Protecting Human Rights: Social Rights as a Case Study

Salim Joubran*

Introduction

Much has been said and written about the use of the courts to protect human rights. Indeed, the main arena in which human rights are discussed, and which merits public attention, is the court system. However, human rights are protected in other arenas as well: the media; the schools and institutions of higher education; the various commissions charged with protecting human rights; and by various non-governmental organizations. I would like to examine, in this article, the ways in which human rights are protected other than through legal proceedings that are conducted within the courts system. I shall attempt to show that human rights can matter, even when the individual is not necessarily granted judicial relief. I shall explain how, in my view, the institution of the State Comptroller plays an important role in ensuring the broad fulfillment of human rights.

The Place of Human Rights in the Social-Legal Fabric

With the enactment of the "Basic Law: Human Dignity and Liberty" and the "Basic Law: Freedom of Occupation," the human rights that are derived from these statutes assumed the status of supra-constitutional principles. [1] The main deliberation regarding the constitutional status of these rights has arisen in the Supreme Court, in cases in which it heard various challenges against legislation or state actions, on the ground that they infringed upon the protected rights of individuals in a constitutionally improper manner. The Supreme Court's foundational decisions on these petitions provide the basis for understanding the status and scope of the constitutionally protected human rights.

Undoubtedly, the foundational case law is of great importance, as it presents all the debates regarding the appropriate balance between human rights and the public interest, in the

* Deputy Chief Justice (ret.) of the Supreme Court.

1 Aharon Barak, HUMAN DIGNITY: THE CONSTITUTIONAL RIGHT AND ITS DAUGHTER-RIGHTS Vol. 1 121 (2014) (Hebrew); CA 6821/93 *United Mizrahi Bank Ltd. v. Migdal Communal Village* [1995] IsrSC 49(4) 221.

context of major legislation. Nevertheless, a focus on this type of deliberation will lead to the neglect of two significant truths.

First, human rights issues play a key role in virtually every legal subject that arises before every court. The need to protect human rights has been an issue in the framework of labor law, administrative law, the laws regarding the Law Enforcement and Collection System Authority, the laws relating to detentions and arrests, etc. – and this need has existed since long before the enactment of the Basic Laws. Thus, the lower courts remain the daily platform for an examination of the application and enforcement of human rights in these contexts.

Second, and perhaps more importantly, the legal proceedings dealing with human rights arise in extreme pathological situations. In such proceedings, an allegation is made that a government authority or entity has violated its obligation to uphold and protect human rights. The obligation to protect human rights is first and foremost the obligation of the government authority. In complying with this obligation, the legislative or the executive branch may exercise discretion regarding the manner in which the particular human rights in question will be realized and how the protection will be balanced against other considerations and interests, such as budgetary limitations. In most cases, the government authorities discharge this obligation faithfully and the Court has no cause to intervene. In other words - the normal situation is one in which the Knesset or the government carries out its obligation to protect the specific relevant human right; however, the "pathological" situation [i.e., the situations of the type that are challenged in the Court] is one in which the Knesset or Government or other government authority is alleged to have failed to carry out the obligation. There is a tendency to view the Court's decision not to intervene in the policy of the executive authority or not to reject Knesset legislation, as being the equivalent of the Court's approval of that policy or law. This view is mistaken, because – unlike the other branches of government – the Court does not have the tools to examine the best alternatives among all the various reasonable options. By contrast, these tools are available to the other branches of government. Further, the Court does not track all the decisions that have been made by various government entities regarding the particular relevant area, and it does not examine them to determine whether they afford the best protection to individual rights. Moreover, from an institutional point of view, and given the obligation of mutual respect among the State authorities, as long as the decision of one authority does not wrongfully infringe upon a constitutionally protected right, it is not appropriate for the Court to make any determination about the authority decisions. The only issue that the Court can determine is the matter of whether the balancing chosen taken by the government authority

– between human rights on the one hand, and political or economic interests on the other – is a proper and permitted balancing.[2]

The situation is different for the institution of the State Comptroller. Unlike the courts, the State Comptroller can undertake a fundamental examination of the way that the legislature or the government has chosen to realize human rights. While the State Comptroller's role is also to examine the legality of the legislatures and government's actions and – if there is reason to believe a criminal statute has been violated – submit the information to the Attorney General.[3] The State Comptroller's authority is not limited merely to the examination of legality, and in this case, the realm of what is reasonable in terms of the governing authority's act. Rather, the State Comptroller is also charged with reviewing other aspects of propriety – such as ethics, efficiency, and more.[4]

Obviously, the Basic Laws concerning human rights apply to the State Comptroller as well. Therefore, the Comptroller's audit must always be carried out with full regard for protected human rights, as these have been interpreted by the Court. However, while the Court will examine only the act's legality in the narrow sense – i.e. it will only determine whether the balancing carried out by the government authority is reasonable (meaning, that it falls within the realm of what could be reasonable) – the State Comptroller is indeed authorized to examine whether the balancing reached by the audited authority is actually the desired balance. In this context, three constitutional roles that are unique to the State Comptroller can be identified:

The first function is the examination of the constitutional balance established by the government authority. As noted above, the State Comptroller's power is not limited to the examination of whether or not the balance is reasonable; the Comptroller can also point to decisions in which insufficient weight was given to some right or another, and review acts which in practice lead to an infringement upon human rights. This determination by the State Comptroller does not mean that the particular State authority's decision was necessarily illegal, but it does constitute an indication that the government authority could have promoted stronger and better human rights protection.

The second unique State Comptroller role is **the initiation of audits** of the audited institutions [i.e., the State Comptroller can choose to initiate an audit of one of those

2 See e.g. EV 11280/02 *Central Election Committee of the Sixteenth Knesset v. Tibi* [2003] IsrSC 59(4) 1, para. 82, per President Barak; HCJ 11344/03 *Salim v. IDF Force Commander in Judea and Samaria*, para. 33 per President Beinish (published in Nevo, September 9, 2009).

3 State Comptroller Law, 5718-1958 [Integrated Version] (hereafter: "the State Comptroller Law"), Section 14(c). Regarding, Section 14(c) of the State Comptroller Law, see Yoram Rabin and Tehilla Winograd, "When the State Audit Gives Rise to a Suspicion of Criminal Conduct" – in this issue, at p. 75 (2018).

4 *State Comptroller Law,* Section 10.

entities which are potentially subject to state audit by law], based on its considered opinion. The State Comptroller can also initiate lateral and follow-up audits. Given this power, the State Comptroller can take a broad view of the state of human rights derived from the standard reports, the follow-up reports, and the reports submitted by the audited institutions regarding their efforts to rectify previous failings.[5] This ability to see a broader picture is not available to the Supreme Court – which addresses only petitions relating to particular infringements, and which are brought before the Court by someone whose rights were already violated; the Court is therefore **unable to initiate** any action leading to broad human rights protection.

Finally, the State Comptroller can speak for those who have difficulties making their voices heard at the audited institutions, and he can thus also relate to the human rights of the weakest and most disenfranchised groups. The State Comptroller's ability to initiate audit proactively[6] allows it to turn the spotlight on population segments whose human rights are violated, even if unintentionally, but who have no platform from which they can speak. This aspect is particularly important in the State Comptroller's work, because the real test of the absorption of the concept of protected human rights lies in the ability and willingness of the government to protect the individuals and groups who are unable to demand their rights on their own, and who find it difficult to raise their claims in court and before the authorities.[7]

Social Rights as a Case Study

I have chosen an example relating to social rights for the purpose of demonstrating the State Comptroller's constitutional role. For many years, the issue of constitutional social rights remained in the margins of legal discourse. It is only in recent years that such rights have been discussed, comprehensively, in Supreme Court decisions.[8] This is not to say,

5 *State Comptroller Law*, Section 21B(a).

6 *State Comptroller Law*, Section 10(a).

7 William L.F. Felstiner, Richard L. Able & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming* 15 L. & SOC'Y. REV. 631 (1981-1980); Daphne Barak-Erez, *From Perceived Injustices to Legal Remedies: After Naming, Blaming, Claiming, Maasei Mishpat* Vol. 3, 33, 35 (2010) (Hebrew).

8 E.g. the right to a minimally dignified life was recognized in the context of RLCA 4905/98 *Gamzu v. Yeshayahu* [2001] IsrSC 55(3) 360; the right to basic medical care was likewise recognized in HCJ 11044/04 [2011] IsrSC 64(3) 778, para. 16, per Justice Procaccia; for a case in which, a statutory provision was stricken because it was found to constitute an unconstitutional infringement of these values, see: HCJ 10662/04 *Hassan v. National Insurance Institute* (published in Nevo, February 28, 2012); regarding the status of the constitutional right to education, see HCJ 2599/00 *Yated—Nonprofit Association of Parents to Children with Down's Syndrome v. Ministry of Education* [2002] IsrSC 56(5) 834; HCJ 6973/03 *Marciano v. Minister of Finance* [2003], IsrSC 58(2) 270.

however, that these rights were not previously at the center of the social or even legal discourse. A review of Israel's entire legal codex shows that Israel has enacted many laws designed to protect social rights, such as the Mandatory Education Law,[9] the National Health Insurance Law,[10] various laws relating to the National Insurance,[11] and the Guaranteed Minimal Income Law.[12] The provisions of these laws led the executive branch of the government to establish entire mechanisms whose core function is to realize and implement these specific rights. This development has provided the basis for countless executive decisions that the State Comptroller must review. The purpose of the state audit regarding these decisions is not to change the specific social welfare policy itself, but rather to examine whether the policy chosen by the legislature and the policy delineated by the executive have been implemented in an optimal manner.

A close reading of State Comptroller audit reports demonstrates that a significant portion of them are dedicated to analyzing exactly these questions. For example, in the annual published reports, the Comptroller has undertaken an extensive review of questions relating to the scope of health care, as it is provided in practice, (i.e. the review is of the realization of the right to health); and the collection of money from parents in the context of the state school system and the propriety of establishing special programs at the universities (i.e. the realization of the right to education);[13] and so on. Thus, these reports devote many pages to the situation regarding the realization of social rights.[14] Additionally, in the past, the State Comptroller has published a special report on water fees[15] and a report on the Law Enforcement and Collection Authority's debt-collection system[16] – as well as other reports on various different aspects of the realization of human rights, at all levels of the activity of the various institutions that are subject to state audit.

The issue of social rights is illustrative of the constitutional importance of the institution of the State Comptroller. The realization of social rights is often the product of a complex but integrated set of legislative actions. For example, the realization of the right to a minimally dignified life existence is effected through an integrated system that provides direct and

9 *Compulsory* Education Law, 5709-1949.

10 National Health Insurance Law, 5754-1994.

11 National Insurance Institution Law [Integrated Version], 5755-1995.

12 Guaranteed Minimal Income Law, 5740-1980.

13 Israel State Comptroller, *Annual Report 63C for 2011 and Regarding Accounts of the 2012 Fiscal Year Accounts* (Hebrew) (2013); and see also, the recent reference to the harm done socioeconomically disadvantaged population segments because of the lack of differential budgeting in the school system in Israel State Comptroller, *2016 Annual Report 67A* (Hebrew) 385-389 (2016).

14 Israel State Comptroller, "Non-Realization of Social Rights", *Annual Report 65C for 2014 and and Regarding Accounts of the 2013 Fiscal Year* (Hebrew) (2015).

15 Israel State Comptroller, *State Comptroller's Opinion on Setting of Water Fees* (Hebrew) (2009).

16 Israel State Comptroller, *The Debt Collection Mechanism of the Collection Authority* (Hebrew) (2016).

indirect allowances and grants. While the guaranteed minimal income is certainly a part of this apparatus, a review of the actual sum of the allowance alone does not afford a full picture of the scope of the assistance that the State provides. This difficulty – of proving, in detail, the scope of the State's support in practice – in order to establish that a constitutional-level violation of a right has occurred, has created tremendous difficulties for claimants who have asked the Court to intervene in the determination of the amounts of the allowances to be provided by the State.[17] Nonetheless, the fact that as of the current time, there has been no successful petition seeking intervention in setting the minimal sum to be paid to those requiring a guaranteed minimal income does not mean that this human right is being denied. It also does not mean, on the other hand, that the actions of the executive branch of government, which is charged with the realization of this right, are continuing without any supervision. The State Comptroller can examine the scope and variety of the totality of the allowances. The State Comptroller can determine whether these allowances achieve the fundamental objectives for which they were created. The State Comptroller can examine the issue of whether or not the Government's decisions regarding the issue are being implemented in practice. In addition, the State Comptroller has the option to undertake an even more comprehensive examination – such as by asking questions about the total number of those eligible who receive support in practice, and about the hurdles facing those seeking to realize their rights.

A practical example of the State Comptroller's contribution to the realization of social rights may be found in the report on the implementation of the "Lehava Project", the objective of which was to reduce gaps in Israeli society with respect to digital access.[18] The project was designed to advance disadvantaged population segments, and was meant to narrow various social gaps arising from lack of digital access. The State Comptroller's report on the project made two major contribution. First, the Comptroller's Office specified a list of deficiencies regarding the management of the tenders for manpower recruitment for the project, and noted the failure to fully implement the decision to create the project. These parts of the State Comptroller's critique are closely related to the Comptroller's function as the entity responsible, for, *inter alia*, overseeing the fitness of an administration's actions, and these parts of the audit's critique are primarily legal in nature. Second, the Comptroller's report noted the disparity between the objectives set for the project and the project's capacity to attain them. For example, the Comptroller noted the need to increase access to the project, and to expand its scope to include the elderly, so that the project could fully achieve its

17 HCJ 366/03 *Commitment to Peace and Social Justice Nonprofit Association v. Minister of Finance* [2005] IsrSC 60(3) 464, para. 20, per President Barak; CA 130/09 *Kadi v. National Insurance Institute Head Office*, para. 10, per Justice Arad (published in Nevo, March 8, 2010).

18 Israel State Comptroller, *Project to Reduce Digital Gaps in Israeli Society (Lehava), Annual Report 64C* (Hebrew) (2014).

objectives. The question of how to divide the project's resources between children and the elderly may, on its face, appear to be a non-legal issue – and it would seem that it would not be possible to transform it into a legal issue by using concepts such as discrimination or administrative irregularity. Nonetheless, it is clearly evident that the problems facing the project actually created an issue regarding the human rights of the elderly in disadvantaged population segments. Technological knowledge in the modern era allows greater access to the public sphere, and constitutes an important resource for overcoming the generation gap; it can also lead to greater individual autonomy and empowerment. The Comptroller's recommendation, which took into consideration the fact that children are already given technological training in the schools, was to adapt Lehava center activities to the population's needs. The Ministry of Finance eventually announced its intention to reexamine its policy on the issue, following the publication of the Comptroller's report. Thus, the social rights of the socio-economically disadvantaged elderly were advanced, without any party having taken recourse to the initiation of legal proceedings.

Conclusion

In this short essay, I have sought to examine the State Comptroller's place and its role in Israel's institutional constitutional fabric. To my understanding, this role is of supreme importance. The need to expand the human rights dialogue beyond the issues debated in the Supreme Court became especially striking during the summer of 2011, when social protests erupted all over the country. The need for all State government authorities to improve, and to develop ways to protect the social rights of individuals as members of Israeli society, is ever-present. It is precisely in this area that the State Comptroller can and does make a large and significant contribution.

From State Comptroller to National Human Rights Institution – A Short But Necessary Path

Elie P. Mersel*, Matan A. Guttman** & Alon Rodas***

I. FOREWORD

"A national, non-judicial, human rights institution" – More than 100 countries throughout the world already have a national human rights institution (hereafter: a "NHRI").[1] Until now, the standard view has been that Israel does not have an NHRI. This article will argue that contrary to that understanding, the Office of the State Comptroller and

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1 Valentin Aichele, NATIONAL HUMAN RIGHTS INSTITUTIONS AN INTRODUCTION (2010); Ryan M. Welch, *National Human Rights Institutions: Domestic Implementation of International Human Rights Law*, 16 J. Hum. Rts. 96 (2016).

Ombudsman of Israel (hereafter: the "State Comptroller") currently serves as the country's NHRI.

This paper describes two main trends that affect the connection between supreme audit institutions ("SAIs") and ombudsman offices and NHRIs**. The first** is the development of NHRIs; **the second** is the transformation of classical SAIs and ombudsman offices into institutions that also handle the protection of human rights. We provide support for our claim that the State Comptroller is the proper entity to serve as the Israeli NHRI and that in essence, he has moved to assume this position. We will answer the question of whether it is appropriate for the State Comptroller to take on this function, and whether he has the authority to do so.

II. DEVELOPMENT OF NON-JUDICIAL NATIONAL INSTITUTIONS FOR THE PROTECTION OF HUMAN RIGHTS

The "human rights revolution" (or the "human rights era") began at the end of the Second World War and still continues.[2] The protection and promotion of, and respect for, human and civil rights have become an integral part of all human activity – both governmental and private.[3] Following the Second World War, numerous international treaties relating to human rights and their protection were signed.[4] Human rights were also enshrined in many national constitutions. Alongside the protections created in these frameworks, NHRIs emerged in the 1970s. At the end of the 1980s, following the collapse of the Communist bloc and the establishment of new democracies in Eastern Europe, creation of these institutions gained momentum. In 2012, some 115 countries had an NHRI, with 60

2 Aharon Barak, THE JUDGE IN A DEMOCRACY (2008) (Hebrew).

3 LCA 6821/93 *Bank Hamizrachi Hameuhad Ltd. v. Migdal Cooperative Village* 49(4) PD 221(1995) (Isr.), para. 1 [per Supreme Court President (emeritus) Aharon Barak].

4 A striking example is the Universal Declaration of Human Rights, signed against the background of the outcomes of the Second World War. *See* Johannes Morsink, *The Universal Declaration of Human Rights: Origins*, Drafting and Intent (1999).

additional countries working to establish one for themselves.[5] These NHRIs included state institutions such as commissioners for civil rights; human rights institutes (or centres); human rights commissions; parliamentary advocates; public defender/protectors; and civil rights protectors.[6]

The UN has defined an NHRI as a non-judicial State institution, which has a constitutional or legal mandate to protect and promote human rights.[7] Since the 1980s, the UN has actively encouraged countries to establish NHRIs. In 1991, a UN conference was convened in Paris, which established the "Paris Principles" that serve as standards for the activities of national institutions such as NHRIs. The UN General Assembly formally adopted them in 1993.[8]

The Paris Principles include the following key components:

1. Independence from government,
2. A broad mandate for action conferred upon the institution by constitution or legislation,
3. The ability to protect and promote human and civil rights,
4. An appropriate and independent budget,
5. Sufficient authority to properly investigate public complaints and carry out broad investigations,
6. The responsibility and authority for issuing reports, recommendations and opinions, and

5 Sonia Cardenas, *Chains of Justice: The Global Rise of State Institutions for Human Rights* 7-9 (2014). Cardenas examines the question of why countries would choose to create a self-restraint mechanism such as a national human rights institution. Among her conclusions, Cardenas notes that the promotion of human rights is not a country's only motivation in establishing such institutions, and that these entities serve as a means used to reduce external criticism of the State's actions. *Id.* at 58-57; it should be noted that the number of NHRIs that Cardenas presented is not final. A comprehensive survey of the literature carried out by the Danish Institute for Human Rights found different numbers in the research literature; *see* Stéphanie Lagoutte, Annali Kristiansen & Lisbeth N. Thonbo, REVIEW OF LITERATURE ON NATIONAL HUMAN RIGHTS INSTITUTIONS 1 (2016); *see also* Zachary Elkins, Tom Ginsburg & JamesMelton, THE ENDURANCE OF NATIONAL CONSTITUTIONS 993-994 (2009), in which the authors say: "One can hardly find a new constitution written in the last twenty years without distinct commissions for judicial appointments, electoral oversight, human rights, and counter-corruption – bodies that were not considered by drafters in the nineteenth century. New constitutional offices, such as an ombudsman or independent central bank, have similarly expanded the scope of constitutions".

6 Henry J. Steiner, Ryan Goodman & Philip Alston, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, AND MORALS: TEXT AND MATERIALS, 1087-1144 (2008).

7 Office of the UN High Commissioner for Human Rights (OHCHR), *National Human Rights Institutions, History, Principles, Roles and Responsibilities* 13 (2010) ("State bodies with a constitutional and/or legislative mandate to protect and promote human rights. They are part of the State apparatus and are funded by the State").

8 G. A. Res. 134, UN GAOR, 48th Sess., 85th mtg., UN Doc. A/RES/48/134(1993); Linda C. Reif, THE OMBUDSMAN, GOOD GOVERNANCE, AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM 5 (2004).

7. The responsibility for promoting national legislation consistent with international obligations, and to ascertain the fulfillment of these obligations.

At the Venice Human Rights Conference in 1993, the participants emphasized the importance of creating an NHRI on the basis of the "Paris Principles".[9] These principles continue to serve as the acid test for the designation of an institute as an NHRI and for the determination of the manner of its functioning. UN institutions are still guided by these principles. Thus, for example, in December 2014, the UN General Assembly, emphasizing the important role played by the NHRIs in the countries in which they operate, called on UN member States to strengthen these institutions for the realization of human rights.[10]

III. THE DEVELOPMENT OF STATE AUDIT INSTITUTIONS AND OMBUDSMAN OFFICES

The auditing of the activities of governmental authorities and of public representatives is the basis of a representative form of government, and has existed since ancient times. The first mention of the duty of public representatives to report to the public regarding their actions can be found 3000 years ago in China.[11] Signs of the existence of a State audit system can be seen in England in 1314,[12] when the office of the Auditor of the Exchequer was created. The foundations of the ombudsman institution (a public complaints commissioner) are found in the Swedish constitution of 1809, which established the institution of the *justitieombudsman*, a public official appointed by parliament and tasked with ensuring that

9 Vienna Declaration and Programme of Action, adopted 25 Jun. 1993, 32 *I.L.M.* 1661, at 1672, para. 36 (1993): "The World Conference on Human Rights reaffirms the important and constructive role played by national institutions for the promotion and protection of human rights…."

10 *See* resolution adopted by the General Assembly on 18 Dec. 2014: "The role of the Ombudsman, mediator and other national human rights institutions in the promotion and protection of human rights".

11 Chinese National Audit Office, "The History of State Audit in China and its Development" at 131, in *State Audit in Israel, Law and Practice* (3nd ed., 1990).

12 David Diyar, *The 'Value for Money' Audit: The first 800 years*, State Audit in Israel, Law and Practice, 73, 74 (3nd ed., 1990). Diyar describes the development of the audit method that examines "value for money" as opposed to the traditional accounting audit. This method was reflected in the examination of the principles of efficiency and savings among the audited entities.

public officials were faithfully carrying out their functions.[13] The concept of State audit institutions and national ombudsman institutions continued to spread during the period following the Second World War.[14] Today, most countries in general, and a majority of democratic countries in particular, have established – either in their constitutions or by statute – a non-judicial institution charged with examining the actions of the executive branch, receiving and investigating complaints regarding the administration and its officials, recommending corrective measures and producing reports concerning various issues.[15]

These institutions play an important role in enforcing the rules of public law, promoting proper administration and holding the administration responsible as regards the public and parliament.[16] The extensive popularity of these audit and ombudsman institutions, as entities that monitor administrative authorities, is not surprising. The development of the administrative State and the welfare state, alongside the expansion of bureaucracies, following the Second World War, transformed the administrative authority into an integral part of the daily lives of all residents of modern States. Governments began to supply many services to their citizens and residents, and to finance other services through third parties, and governmental entities now organize and monitor matters in many additional areas. In

13 Walter Gellhorn, *The Swedish Justitieombudsman*, 75 *Yale L. J.* 1 (1965); Eklundh Claes, *The Swedish Parliamentary Ombudsman System*, Human Rights Commissions and Ombudsman Offices 423 (Hossain *et al.* eds., 2000). Over time, the function of the "ombudsman" changed and was transformed from a purely supervisory parliamentary body into an entity that also receives complaints from the public with regard to government actions. *See* Reif, *supra* note 8. *See also British Columbia Development Corporation v. Friedmann (Ombudsman)*, [1984] 2 S. C. R. 447, 458 ("As originally conceived, the Swedish Ombudsman was to be Parliament's overseer of the administration, but over time the character of the institution gradually changed. Eventually, the Ombudsman's main function came to be the investigation of complaints of maladministration on behalf of aggrieved citizens and the recommendation of corrective action to the governmental official or department involved").

14 *See* Reif, *supra* note 8, p. 6.

15 *Id.* p. 11. It should be noted that the International Organization of Supreme Audit Institutions (INTOSAI) has 191 members from all over the world. For a definition of the term "ombudsman" as an entity investigating public complaints, *see* Ombudsman Committee, International Bar Association Resolution [Vancouver International Bar Association] (1974), ("An office provided for by the constitution or by action of the legislature or Parliament and headed by an independent high-level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials and employees or who acts on his own motion, and who has the power to investigate, recommend corrective action, and issue reports").

16 Peter Cane, ADMINISTRATIVE LAW, Oxford, Oxford University Press, 3, 9, (5th ed., 2011). In which the author writes: "many public decisions can be the subject of an internal review by the relevant department or agency, or an appeal to a tribunal (or a court); citizens may complain about the conduct of a public administrator to the relevant agency or to an ombudsman. Bureaucratic bodies may also be subject to various types of auditing and inspection, and to scrutiny by a Parliamentary committee. Such accountability mechanisms not only provide means for dealing with citizens' grievances and for resolving disputes with the administration but also incidentally generate norms that regulate administration. Some such regulatory norms have the status of hard law (if they are made by courts or tribunals), but others are soft law – for instance, one of the things ombudsmen do is develop and promulgate 'principles of good administration' based on lessons learned from handling citizens' complaints".

effect, every individual lives his or her life in partnership, as it were, with an administrative authority. The deep involvement of administrative agencies and bureaucracies in the private lives of individuals has both positive and negative aspects. On the one hand, the bureaucracies of the administrative authority were established to serve the individual within the modern State, and they provide the individual with basic welfare and ensure his or her rights. On the other hand, the authority and power given to the administrative authority have the potential for harming the public interest – by enabling its abuse of power for the personal benefit of officials, and by harming individuals and trampling on their rights. This is a unique dilemma that is faced by the modern State: if it seeks to promote the public welfare, more power must be given to the administrative authority and its officials; but the more powers they have, the greater the risk of harm to the public interest and individual rights.[17] The audit and ombudsman institutions were established primarily to provide assistance in resolving this dilemma – to ensure the monitoring and control of a powerful administration. These institutions, which receive complaints directly from the public and also methodically examine specific and systemic issues at their own initiative, are the institutions that "protect" the public from the commonplace wrongs committed by administrative authorities. As the Canadian Supreme Court noted:

> "The traditional controls over the implementation and administration of governmental policies and programs —namely, the legislature, the executive and the courts —are neither completely suited nor entirely capable of providing the supervision a burgeoning bureaucracy demands. The inadequacy of legislative response to complaints arising from the day-to-day operation of government is not seriously disputed. The demands on members of legislative bodies is such that they are naturally unable to give careful attention to the workings of the entire bureaucracy. Moreover, they often lack the investigative resources necessary to follow up properly any matter they do elect to pursue. The limitations of courts are also well-known. Litigation can be costly and slow. Only the most serious cases of administrative abuse are therefore likely to find their way into the courts. More importantly, there is simply no remedy at law available in a great many cases".[18]

This situation has impacted directly on the development of audit institutions. The weakening of the legislative institutions and the state of executive branch entities has accelerated the establishment of State audit frameworks intended to give legislators a tool with which to

17 Roy Gregory & Peter Hutchesson, THE PARLIAMENTARY OMBUDSMAN, 15 (1975) ("[i]n the modern state … democratic action is possible only through the instrumentality of bureaucratic organization; yet bureaucratic power – if it is not properly controlled – is itself destructive of democracy and its values").

18 *Supra* note 13, at 459-460.

supervise the actions of the executive agencies. The process of maintaining the welfare state with its many programs has put greater emphasis on the need to increase the supervision of the executive branch agencies by the legislative branch.[19]

The inherent inability of the legislative and judicial branches to effectively deal with the evil of maladministration and with agencies that are insensitive to individuals and their needs has transformed the audit institutions, and in particular the ombudsman offices, into one of the most important agencies within most democratic countries. These institutions were given unique authority to oversee the tremendous power that has been given to executive branch administrative agencies:

> "The Ombudsman represents society's response to these problems of potential abuse and of supervision. His unique characteristics render him capable of addressing many of the concerns left untouched by the traditional bureaucratic control devices. He is impartial. His services are free, and available to all. Because he often operates informally, his investigations do not impede the normal processes of government. Most importantly, his powers of investigation can bring to light cases of bureaucratic maladministration that would otherwise pass unnoticed… In short, the powers granted to the Ombudsman allow him to address administrative problems that the courts, the legislature and the executive cannot effectively resolve".[20]

IV. THE INTEGRATION AND INVOLVEMENT OF THE CLASSIC AUDIT AND OMBUDSMAN INSTITUTIONS WITH THE PROTECTION OF HUMAN RIGHTS

The normative change in the status of human rights and the central position that they have begun to hold with respect to governmental activity have created a challenge for SAIs and ombudsman institutions. These institutions have begun examining their role in protecting and strengthening human rights in the countries in which they operate. On the one hand, most features listed in the Paris Principles apply to them and to the manner in which they operate, particularly in connection with their independence and broad mandate for action.[21] On the other hand, the human rights issue has not expressly been made part of these

19 Asher Friedberg, *Foreword*, State Audit in Israel- Law and Practice, 12 (3nd ed., 1990).

20 *Id.* at 461.

21 *See*, *e.g.*, the guidelines, similar to those set out in the Paris Principles, put forth in the 1977 Lima Declaration of Guidelines on Auditing Precepts and the Mexico Declaration on SAI Independence (2007).

institutions' core activities. Customarily, these institutions focus on maladministration, public corruption, financial audit, and other similar matters.[22]

Some SAIs and ombudsman offices have begun, since the 1980s, to change their traditional functions, and to increasingly engage in the protection of human rights. As John Hopkins has noted:[23]

> "'Human rights' (or 'hybrid') models combine the concept of the National Human Rights Institution (NHRI), as outlined in the Paris Principles … with that of the 'classical' ombudsman, placing human rights at the core of the ombudsman enterprise. This model is now particularly prevalent in Latin America, Eastern Europe and parts of Africa. The link between ombudsmen and rights has become increasingly obvious even among those ombudsmen which are not formally recognized as NHRI's. Many 'classical' ombudsmen, for example, now exercise jurisdiction in areas which require consideration of the Paris Principles…. The nature of the ombudsman institution is therefore not as clear-cut as was originally the case but, despite debate over its exact definition, its development has been one of the most important constitutional innovations of the late twentieth century".

This phenomenon of fusing SAIs and ombudsman institutions and national human rights institution can be understood as following one of several models. These models reflect the manner in which different legislatures have authorized audit institutions to protect human rights, and the manner in which the audit institutions interpret this arrangement.[24]

A. The latent implied model

One model is the latent implied model. In systems in which this model is used, the legislature has not granted the SAI and ombudsman institution any express authority to involve itself in the protection and promotion of human rights. The latter are authorized to engage in other issues, and they infer that they have this additional power from the authority that they do have. Thus, for example, without being specifically delegated such authority, the SAI and ombudsman institution understand that the protection of human

22 Herbert A. Simon, ADMINISTRATIVE BEHAVIOR (4th ed., 1977).

23 Johns W. Hopkins, *Ombudsman*, Max Planck Encyclopedia of Comparative Constitutional Law (2016).

24 Regarding the various approaches concerning other models according to which the ombudsman institutions function in protecting human rights, *see also* John F. Robertson, *The Ombudsman Around the World*, The International Ombudsman Yearbook 112, 115-116 (1998); Benny Tai, *The Hong Kong Ombudsman and Human Rights Protection Revisited*, 17 Asia Pac. L. Rev. 95 (2009).

rights constitutes an integral part of proper administration and the rule of law – which they are tasked with guarding. Their purview, therefore, is also protecting human rights.

When this model is the norm, the SAIs and ombudsman institutions can be affected by human rights laws, but their main focus is on proper administration and the clarification of public complaints. For example, when a country has incorporated within its internal law the provisions of the International Convention on Civil and Political Rights[25] and the provisions of the International Covenant on Economic, Social and Cultural Rights,[26] the SAIs view themselves as authorized to examine the care with which these provisions are implemented in the framework of maintaining proper administration. As such and as part of the work of the SAIs and ombudsman institutions in ensuring proper rule of law, the country's compliance with its international obligations to respect human rights is examined. This model has been adopted in the audit institutions operating in countries such as New Zealand,[27] Hong Kong and Australia.[28]

B. The overt implied model

Another model is the over implied model. In systems in which this model has become the norm, the legislature did not grant the audit institutions express authority to involve themselves with and promote human rights (as is the case with the latent implied model). These audit institutions, and the individuals heading them, however, have determined and declared that their function is to protect and promote human rights. In other words, these institutions have interpreted their mandate, which was given to them by law or by the relevant constitution, as including the protection of human rights, despite the fact that this function was not expressly given to them. The adoption of the overt implied model by the audit institution or the ombudsman institution indicates a transition from the examination of proper administration only to the examination of proper administration and the express and clear promotion of human rights protection. In other words, the audit institution has expressly established that a part of its role, in addition to the traditional functions, is the examination and handling of executive branch violations of human and civil rights. In addition, under this model, the audit institutions take the position that any legislative or

25 The International Covenant on Civil and Political Rights, *Israel Treaties* 31, 269 (opened for signature in 1966, ratified by Israel in 1991).

26 International Covenant on Economic, Social and Cultural Rights, 31, 205 (opened for signature in 1966, ratified by Israel in 1991).

27 Anand Satyanand, *The Ombudsman Concept and Human Rights Protection*, 29 Victoria U. Wellington L. Rev. 19, 23 (1999).

28 John McMillan, *The Ombudsman's role in human rights protection: An Australian perspective*, the 11th Asian Ombudsman Association Conference (2009).

regulatory act or administration guideline includes, necessarily, a rule of interpretation that provides for the protection of human and civil rights. The difference between this model and the latent implied model is based on the former's declaratory aspect, which relates to the manner in which the audit institution understands its function with respect to the protection and promotion of human rights, both on the practical plane – the main focus of the SAI – and in the perception of the protection of human rights as a key function. At the same time, even under this model, the traditional audit functions such as the examination of government administration and possible public corruption still garner the greatest share of attention. The overt implied model is followed in, among other places, Ireland and England.[29] It is interesting to note that in Ireland and England, this model was adopted after these States made the European Convention on Human Rights part of their internal law. This development changed the legal status of human rights to the status of a quasi-constitutional elements,[30] and accelerated the positioning of human rights at the centre of the functions of the SAIs and ombudsman offices in these countries. The overt implied model has also been implemented in the Netherlands, Norway,[31] and Spain.[32]

It should be noted that the issue of whether an audit institution should be classified as either following the latent implied model or overt implied model depends on the **interpretation** of the legal or constitutional authority used by the institution. Accordingly, the adoption of these models depends primarily on the approach taken by the SAIs and those who head them – which approach may change over time. The adoption of these models is not done through legislation or constitutional amendment. All that is needed is a change in the understanding and perception of the audit institution, which is a consequence of the human rights revolution.

C. The overt model

In the overt model, a law (whether enacted or part of the constitution) empowers the audit institution to act to promote, protect and preserve human rights. An example would be Finland, which chose this route in 1995.[33] The overt model is also the model recommended

29 Emily O'Reilly, *Human Rights and the Ombudsman*, British and Irish Ombudsman Association (2007); Nick O'Brien & B. Thompson, *Human rights and accountability in the UK: deliberative democracy and the role of the ombudsman*, 5 *Eur. Hum. Rts. L. Rev.*, 504, 506 (2010); Carolyn Hirst & Emma Gray, *Human Rights and the Scottish Public Service Ombudsman*, 37 Scottish Hum. Rts. J. (2007).

30 *See* Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (2007).

31 *Norwegian Parliamentary Ombudsman,* Annual Report 1990, 22-23; See Reif, *supra* note 8.

32 Hopkins, *supra* note 25 at para. 32.

33 *Parliamentary Ombudsman Act* (2002) [Finland]. Section 109 of Finland's constitution provides as follows: "In the performance of his or her duties, the Ombudsman monitors the implementation of basic rights and liberties and human rights."

by European Union institutions. Thus, for example, the Council of Ministers of the European Union recommended to the EU members that they grant their national ombudsmen explicit authority to protect and preserve human rights.[34]

D. The Co-Existence Model

In countries in which national institutions for the protection of human rights have been established, *e.g.*, a human rights commissioner, the question arises as to the nature of the relationship between the new institutions and the SAIs that have also been engaged in the protection of human rights (whether the particular country has adopted the latent implied model, the overt implied model, or the overt model). In some countries, however, a hybrid model has been adopted – *i.e.*, a model that incentivizes cooperation, supplementation, and harmony among all institutions whose function it is to protect and promote human and civil rights. These institutions do not compete; instead their relationship is complementary and synergistic. Through their cooperation, all institutions contribute to the promotion and preservation of the State's human and civil rights. The co-existence model is followed in Ireland, where the SAI adopted the declarative implied model and acts in cooperation with and in parallel to Ireland's national institution for the protection of human rights.[35] The hybrid model also exists in South Africa, which – following the apartheid era – adopted a modern constitution that places the protection of the rule of law and human rights at the top of its list of priorities. Section 181 of the South African constitution establishes a number of governmental institutions: the Public Protector, the Human Rights Commission; the Commission for The Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality; the Electoral Commission; and the Auditor-General. The function of all of these institutions is to support and strengthen

34 *Recommendation No. R(85)13 of the Committee of Ministers to Member States on the Institution of the Ombudsman adopted by the Committee of Ministers* (1985).

35 O'Reilly, *supra* n. 29.

constitutional democracy in South Africa. These institutions have full independence, subject to the Constitution and the law, in fulfilling their mission.[36] As noted by Hopkins:

> "South Africa remains a model for the operation of a divided system, but emphasizes the need for co-operation in such examples. It also marks part of a wider global trend for ombudsmen to see their role increasingly through a Human Rights lens".[37]

The models described above relating primarily to the relationship between "classic" ombudsman institutions and NHRIs are also relevant with respect to the relationship between SAIs and NHRIs. In recent years, the value of SAIs and their contribution to society and to the individual, and the fact that their audit work must contribute to the improvement of individual lives, has been highlighted. Thus, for example, ISSAI Standard Number 12 (promulgated by INTOSAI)[38] establishes that SAIs must make a change in the life of individuals living in the country, be cognizant of the changes taking place in society and respond to them and make the public aware of their audit findings in an effective manner. To implement this concept, SAIs' audits must examine, among others, government programs in social areas that provide services and benefits to residents and the manner in which the executive branch preserves the rights of the individual. Accordingly, for example, the past president of the Constitutional Court of South Africa, Judge Ngcobo, made the following remarks regarding the important role of SAIs in the field of social rights, at the 2010 INTOSAI convention:[39]

> "The adoption of the Universal Declaration of Human Rights, followed by the adoption of the International Covenant on Economic, Social and Cultural Rights, which was ratified by some 130 countries, and the various regional

36 *See* Sec. 181 of the South Africa Constitution, which provides as follows: "1. The following state institutions strengthen constitutional democracy in the Republic: a. The Public Protector; b. The South African Human Rights Commission; c. The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; d. The Commission for Gender Equality; e. The Auditor-General; f. The Electoral Commission. 2. These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice. 3. Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions. 4. No person or organ of state may interfere with the functioning of these institutions. 5. These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year."

37 Hopkins, *supra* note 25 at para. 28.

38 *See* "ISSAI International Standard 12: The Value and Benefits of Supreme Audit Institutions – Making a difference to the lives of citizens", *INTOSAI* International Organization of Supreme Audit Institutions, www.intosai.org/issai-executive-summaries/view/article/issai-12-the-value-and-benefits-of-supreme-audit-institutions-making-a-difference-to-the-liv.html.

39 Sandile Ngcobo, *Why do Supreme Audit Institutions Exist? a Reflection on Their Role in Society and the Pre-conditions Necessary for Them to Perform This Role*, INCOSAI, 23 Nov. 2010) (unpublished).

> instruments and national constitutions and statutes embodying socio-economic rights, underscore the importance of these basic amenities of life.... **The work of supreme audit institutions is crucial to the fulfilment of socio-economic rights....** The people of each nation have a variety of needs, ranging from health-care and education to communication and transport. Each state has an obligation to fulfil these needs. The ability of each nation to meet this obligation depends on how public funds are spent. Irresponsible government spending, corruption, under-spending and inaccurate budgets will undermine the achievement of these constitutional goals. [Emphasis added]".

V. THE OFFICE OF THE STATE COMPTROLLER AND OMBUDSMAN IN ISRAEL AS AN NHRI

In most countries, there is a supreme audit institution whose main function is to examine the legality, proper administration, economy, effectiveness and efficiency of the public entities that it is empowered to audit. Alongside these SAIs, there are, in most countries, separate national institutions tasked with investigating, non-judicially, public complaints made against governmental authorities. In all these various countries, there is a separation between the SAI and the ombudsman institution.

In Israel, however, there is a unique arrangement in which the two institutions are combined into one entity.[40] In this section, we provide support for the argument that Israel should adopt the "overt implied model". For this model to be adopted, two conditions must be met: the first is that the adoption of the NHRI function by the state comptroller and his declaration of such must constitute an **appropriate** measure; the second is that there must be support for the institution of the State Comptroller having the **authority** to examine the activity of the audited bodies in accordance with constitutional human rights norms. If these conditions are met, we must examine whether the Basic Law: Human Dignity and Liberty does in fact impose on the State Comptroller a **duty** to exercise his authority in the field of the protection of human rights.

40 Miriam Ben-Porat, *Basic Law: The State Comptroller* 26-33 (Y. Zamir, ed., 2005) (Hebrew) (hereafter: "Ben-Porat, *State Comptroller Law*"); Taiwan is another country in which there is also a separate government authority that includes both the ombudsman's office and the state comptroller. *See* sections 90-106 of the Taiwanese Constitution, law.moj.gov.tw/Eng/LawClass/LawParaDeatil.aspx?Pcode=A0000001&LCNOS=%20%2090%20%20%20&LCC=2.

Is it appropriate for the State Comptroller to act in the field of human rights? Is it appropriate for the Israeli State Comptroller institution to have a significant position *vis-à-vis* the protection and promotion of human rights in Israel? In our view, the State Comptroller – both in the context of conducting systemic audits of governmental authorities (the state audit) and in the context of its role of ombudsman – has features consistent with an institution that is engaged in the promotion and protection of human rights, alongside additional institutions such as the courts.[41]

Former State Comptroller Miriam Ben-Porat, discussing the State Comptroller's role in protecting democracy and human rights in the State of Israel, said:[42]

> "Allow me to add a few words about the Comptroller as a defender of Democracy and human rights, beyond the classical basic rights and social and economic rights contained in the Declaration of the United Nations of 1948. The reports of the Comptroller cover a wide spectrum of rights. We deal with vital questions of defense and security, some of them, for obvious reasons, in reports unknown to the public. We deal with a variety of subjects from many angles: education; health; the treatment of the weak population and minorities; adoption; pollution of air and water resources; whether pecuniary support extended to various institutions complies with criteria of equality and fairness; finance, salaries, pensions, shares; wiretapping as an invasion of privacy, if not used properly and only as a last resort to detect crime, and so on. These are only examples which indicate that not only the Ombudsman, but also the Comptroller concerns himself with human rights. Whilst the former does so directly, giving redress to the individual complainant, the latter contributes to the preservation of basic rights indirectly, by dealing in his reports with to pics which concern many individuals. A better administration is better suited to provide good services".

41 Miriam Ben-Porat, *Mutual relations between the State Comptroller and the Attorney General*, 26 Hamishpat 3, 6 (2008) (Hebrew) ("In granting the State Comptroller the function of the ombudsman, and tasking him with the investigation of public complaints, the legislature created an investigation method which is neither judicial nor quasi-judicial – it is instead a route that is an alternative to anything judicial. When the submitted complaint relates to a matter that is subject to judicial review, the party who has been harmed by an illegal action (which is subject to the authority of the "regular" courts) or by an action that is administratively defective (which is subject to the authority of the High Court of Justice), has two options: if he wishes, he can appeal to the appropriate judicial forum; and if he wishes an alternative – he can file a complaint with the ombudsman."; Regarding the relation between the High Court of Justice and the State Comptroller, *see* HCJ 453/84 *Iturit Communications Services Ltd. v. Minister of Communications,* 38(4) PD 617 (1985) (Isr.).

42 Miriam Ben-Porat, *The Ombudsman as the Protector of Democracy and Human Rights*, Studies in State Audit 57, 82, at 90 (1997) (Hebrew).

In our view, given the current reality, it is important to transform the institution of the State Comptroller into an NHRI, to fill in what is missing in terms of institutions dealing with the protection of human rights in Israel. As stated, the protection of human rights in the courts or through other entities[43] is insufficient and cannot take the place of the work of an independent institution working to protect rights. It is, therefore, appropriate that the State Comptroller expressly adopt this role.

Does the State Comptroller have the authority to operate in the area of human rights? The State Comptroller's authority, as that of the three classical governmental branches – the legislative, judicial and executive – is anchored constitutionally. In the case of the Israeli State Comptroller, the authority is established in the Basic Law: State Comptroller.[44] The State Comptroller is a "constitutional actor" playing an important role in the protection of Israeli democratic values, and in ensuring that the necessary checks and balances remain in place within Israel's democratic system. In Israel's constitutional era,[45] the fact that the source of the Comptroller's authority is grounded in the constitution is very significant because this denotes that the position's constitutional power can be **modified**[46] or **reduced**.[47] It also has implications regarding the interpretation of the nature of this constitutional power. Can we infer from this that the State Comptroller has the authority to examine the actions of the audited bodies in accordance with constitutional human rights? The position taken in this article is that the Comptroller does have this authority.

The State Comptroller's authority to examine the actions of the audited bodies through a constitutional human rights lens can be understood from the nature of the authority enshrined in section 2(b) of the Basic Law: State Comptroller, which provides that "[t]he State Comptroller will examine the legality of the actions [of the audited bodies]." The interpretation of this phrase, as part of a constitutional text, must take into consideration the special character of a constitution.[48] This special character arises from a constitution's unique status at the top of the normative legislative pyramid, and as the element that shapes the State's image. The Israeli Supreme Court, in discussing the manner in which a Basic Law should be interpreted, noted that:[49]

43 Entities such as the Commission on Equality for Persons with Disabilities, or the Equal Employment Opportunity Commission. *See* proposed Commission on Rights of the Child Law, 5775-2014.

44 *See Bank Hamizrahi*, *supra* note 3.

45 Claude Klein, *A New Era in Israel's Constitutional Law*, 6 Isr. L. Rev. 376 (1971); Gideon Sapir, *Constitutional revolutions: Israel as a case-study* Int'l J. L. in Context 355 (2009).

46 In Israel, a Basic Law can only be amended through another Basic Law.

47 *See* HCJ 5113/12 *Friedman v. the Knesset* (2012) (Isr.).

48 Aharon Barak, *A Constitutional Revolution: Israel's Basic Laws*, Yale Law School Legal Scholarship Repository (1993) (Hebrew).

49 HCJ 6427/02 *Movement for Quality Government in Israel v. the Knesset* (2006) (Isr.).

> "The nature of the Basic Laws, which were intended to shape the image of the society and of its aspirations throughout history, must be expressed; these laws were enacted to establish the country's most basic concepts and the basis for its social principles; they seek to determine the country's aspirations, obligations and the directions it seeks to follow. The Basic Laws were intended to direct human behavior for a long period of time. They reflect the events of the past; they guide the basis for the present; they are intended to establish the face of the future. They are philosophy, politics, society and law all brought together".

In a different case, the Court wrote as follows:[50]

> "When we interpret a Basic Law, we must do so in a manner realize the function of the constitutional norm. A constitution establishes the procedures of government and law. This norm shapes the rights of the individual, because of its nature, it reflects the basic concepts of the society, of the law and of the regime. It is an expression of the country's basic political beliefs. It establishes the foundation for its social values. It determines the country's aspirations and the directions it wishes to take. In interpreting a constitutional text, we must give expression to this special character of the text".

A constitutional norm must be interpreted "by taking a broad view".[51] Constitutional texts are interpreted in accordance with constitutional purpose. The constitutional purpose is understood from the language, history, culture and basic principles. A constitutional provision is enacted in a constitutional sphere, and it does not develop in a constitutional vacuum. It constitutes a part of life itself.[52] The language in the Basic Law: State Comptroller that authorizes the Comptroller to examine the "**legality of the actions"** of the audited bodies should be interpreted in this way as well.

The proper interpretation of this constitutional provision in the Basic Law: State Comptroller is, effectively, that he or she is empowered to determine whether audited bodies are acting in accordance with rule of law, in its broadest terms. In this regard, the former State Comptroller said: "The term 'legality of the actions' is broad…. The State Comptroller's authority to examine the legality of the actions of the audited bodies is very important … this is a weighty measure that can be used for the protection of basic values and for the purpose of protecting the rule of law."[53] As Ariel Hecht noted:[54]

50 HCJ 1384/98 *Gilad Avni v. the Prime Minister*52 (5) P.D. 206, 210 (1998) (Isr.).

51 Aharon Barak, *Interpretation of Basic Laws* 22 *Mishpatim* 31, 52-53 (1992) (Hebrew).

52 *Bank Hamizrachi, supra* note 3, at 429.

53 Miriam. Ben-Porat, supra note 40, at 227, 229.

54 Ariel Hecht, *The Question of Legality in State Audit*, 18 *Hapraklit* 338, 343 (1962) (Hebrew).

> "The authorization of the State Comptroller to audit legality has great weight. It is true that the protection of the law and the exercise thereof is primarily entrusted to the judges. They alone interpret it with authority. However, their impact is somewhat happenstance, since they cannot express their opinion unless they are called to do so by the litigants. The State Comptroller, in contrast, can, on his own, initiate and plan his activity in a methodical manner…. This authorization confers upon the state audit body considerable power in protecting of the rule of law. The purpose of legal review[55] is not, either directly or indirectly, to increase the efficiency of the audited entity with respect to the execution of its tasks. But the ability to conduct such review does confer upon the comptroller an important ability with which to protect basic political values that are necessary for this protection".

In a democratic country, human rights reflect values that need constant protection. The rule of law, in its substantive sense, realizes democratic values, primarily human rights.[56] Democracy itself is based on the rule of the majority and on the rule of values, primarily human rights.[57] This foundation becomes doubly important in today's constitutional era. All statutory provisions must be interpreted in accordance with the Basic Laws dealing with human rights, as the provisions of the Basic Law: State Comptroller must also be. The State Comptroller cannot remain indifferent in the face of such far-reaching changes in Israeli law, and he must, in accordance with the Supreme Court's case law, reinterpret his authority so that they include the protection, development and promotion of human rights as a central and independent part of his work, alongside his traditional functions of ensuring proper administration and ethical behavior. The examination of the constitutionality of government actions also requires a determination of whether the actions taken by the audited entities amount to a violation of the constitutional human rights recognized in Israeli law.

Thus, the State Comptroller's authority to protect the values of a democratic government, human rights being primary among them, is a constitutional authority. The action of an entity, subject to the Comptroller's audit, that violates human rights to a disproportionate degree is an illegal act and the State Comptroller must censure such actions. The State

55 In his article, Hecht distinguishes between the roles of the State Comptroller in carrying out "economic audit" and "legal audit", the latter of which deals with the auditing of the legality of actions.

56 Nicholas Emiliou, *The Principle of Proportionality in European Law* 40 (1996) ("Substantive rule of law requires the realization of a just legal order. Above all it subjects sate power to substantive, definite and unmemorable constitutional principles and material basic values. The emphasis of state activity should not be primarily on the establishment of a scheme of formal guarantee of freedom, It should rather be on the attainment, preservation and award of substantive justice within the sphere of the state and those spheres susceptible to state influence"); *See also* HCJ 428/86 *Barzilai v. Government of Israel,* 40(3) P.D., 505, 622 (1986) (Isr.); HCJ 6163/92 *Eisenberg v. Minister of Building,* 47(2) P.D., 229 (1993) (Isr.).

57 Aharon Barak, *supra* note 2, at 23-26.

Comptroller must examine the actions of an audited body to ascertain that they reflect proper balancing of individual rights and the public interest. A State audit, therefore, can be seen to play a very important role in the Israeli democratic system. The State Comptroller must determine whether the actions of the audited bodies are carried out in accordance with the constitutional human rights laws, and if a violation is found, he must examine its constitutionality in accordance with the conditions established in the limitations clause. As noted by Professor Aharon Barak in an article on this subject:

> "The State Comptroller – both with respect to the general audit function and the ombudsman role – must ensure respect for constitutional rights. Indeed, the provisions of section 2(b) of the Basic Law: the State Comptroller provides that "[t]he State Comptroller shall inspect the legality of the actions … of the audited bodies," This provision authorizes the State Comptroller to determine whether the executive branch is properly protecting the individual's constitutional rights against the State".[58]

An additional source for validating the State Comptroller's authority to examine issues relating to the protection and promotion of human rights with respect to the actions of audited bodies is the "basket clause" in section 2(b) of the Basic Law, which provides that the State Comptroller has the power to examine any "other matter that he deems necessary." In addition to these two bases for the Comptroller's authority, we should also examine the possibility of proposing legislative amendments that would give the State Comptroller special authority in the area of human rights in Israel. Such authority would include the license to submit to the Attorney General any case in which human rights are being violated, for the purpose of initiating legal proceedings; as well as powers in the area of education and concerning the ability to publicize issues in the field of human rights. It has been proposed in the past that Israel should adopt the "overt model" by amending the Basic Law: State Comptroller and the State Comptroller Law, so that they confer upon the State Comptroller overt authority to examine human rights violations. The explanatory material accompanying a proposed law intended to do just this noted that: [59]

]T[he anchoring of the concept of preserving human rights as a norm, one which the State Comptroller will examine in the framework of his ongoing audit work, is intended to strengthen the supervision of human rights protection and to fortify those rights, and it is derived from the heightened status of human rights in Israel's constitutional law. By virtue of his independence and the absence of any dependence, the State Comptroller can

58 *See* Aharon Barak, *The State Comptroller and Human Rights in Israel*, Studies in State Audit 63 (2018) (Hebrew).

59 Proposed Basic Law: State Comptroller (Amendment), (2000), available [in Hebrew] at http://www.mevaker.gov.il/he/Reports/Pages/374.aspx?AspxAutoDetectCookie Support=1.

contribute to the strengthening of human rights, and this function fits in with the the main function of the audit institution – which is the protection of the State's democratic character.

In this context, former State Comptroller Eliezer Goldberg noted that the goal of the proposed amendment was to seek, *inter alia*, to anchor in law the State Comptroller and Ombudsman's function concerning the protection of human and civil rights. It is true that the State Comptroller and Ombudsman has long examined the protection of human and civil rights in the framework of his position, and that he investigates complaints regarding their violation, but it is also important to enshrine this matter in express statutory language, and this fits in with the purpose of protecting the State's democratic nature.[60]

These proposed laws have never been enacted.

A general constitutional duty to protect human rights – The State Comptroller's work in the human rights area is not only proper and possible by virtue of his authority, it is also obligatory. Section 11 of the Basic Law: Human Dignity and Liberty provides that "[a]ll governmental authorities are bound to respect the rights under this Basic Law". The State Comptroller is a government authority and is, therefore, required to respect constitutional rights, as are all other governmental entities.[61] On the one hand, the Comptroller as a comptroller is obligated to respect human rights. This would be the case, for example, as far as anything related to the granting of the right to a hearing to an audited body before the audit report is published – this right might be violated in the context of the State Comptroller's report and the latter would be obligated not to violate that right. In *Terner v. State Comptroller,* the Israel Supreme Court held that the State Comptroller is obligated by the Basic Law: Human Dignity and Liberty to allow a party that may be harmed by his reports to present arguments in his defense.[62] The present State Comptroller Judge (Ret.) Joseph Shapira, in his swearing-in ceremony, said in this respect:

60 The State Ombudsman of Israel, *Introduction*, Annual Report 27 (2001) (Hebrew).

61 Aharon Barak, *Proportionality in the Law*, 467 (2010) (Hebrew).

62 HCJ 4914/94 *Terner v. State Comptroller,* 49(3) P.D., 771, 790 (1995) (Isr.). ("The protected value of human dignity, in the Basic Law: Human Dignity and Liberty, also requires that a move that amounts to a violation of human dignity, even if it is carried out for a proper purpose, should not be taken before the affected person has had the opportunity to present arguments against the move – in the sense that he must be given all the evidentiary material and an opportunity to respond to it, a right which is the 'safety belt' against a 'greater than necessary' violation"). Similarly, *see* HCJ 7805/00 *Aloni v. Jerusalem Municipality Comptroller,* 57(4) P.D., 577, at p. 602 (2003) (Isr.), the Court held that "when there is a suspicion regarding a person's reputation arising from an act of audit, the audited party's right to review generally requires that all the material relevant to the audit be provided to him, unless there are especially important reasons, connected to the functioning of the audit system, which justify the failure to do so. This rule is necessary because of the duty to give an audited party a full opportunity to respond to the claims made against him, and it can help establish his and the public's faith in the audit system, allowing them to believe that it will do its job without prejudice or bias."

The State Comptroller is a unique entity, and as a result of his reports – although no one will lose their freedom – a good reputation can be harmed … sharp and intense criticism does not conflict with fairness to the audited party, with respect for human dignity, and in my eyes, all these can stand together.[63]

Nevertheless, the Basic Law: Human Dignity and Liberty obligates the State Comptroller to actively work to protect and promote human rights. In the same way that the duty to promote human rights is imposed on any government authority by virtue of the authority granted to it by law, the State Comptroller is also required to do so in the exercise of his authority. Therefore, in determining the audit work program, and the program for investigating public complaints, the State Comptroller must work to protect, promote and respect human rights.

A specific constitutional obligation to protect human rights – As noted above, Section 2(b) of the Basic Law: State Comptroller provides that the "[t]he State Comptroller will examine the legality of the actions" of the audited bodies. This provision not only grants authority to the State Comptroller, it also contains within it the mandate to use this authority. For the State Comptroller to be able to examine the legality of governmental entities' actions with regard to their impact on human rights, the Comptroller must expressly adopt the function of protecting and promoting human rights as a central part of his work. In the Israeli case, the "hybrid model" and the "overt model" are not relevant, since Israel has not established an independent institution that constitutes an NHRI, and this function has not been directly assigned to the State Comptroller. Additionally, the latent implied model is not suited to Israel since it leaves the handling and protection of human rights secondary to the main *raison d'être*, the examination of proper administration, with the examination focusing on the implementation of the provisions relating to human rights that have been incorporated into and established as part of the country's laws. "The overt implied model", in contrast, gives a central place to safeguarding of human rights within the State Comptroller's work, and its adoption is necessary given the language of the Basic Law.

Institutional advantage for the protection of human rights – The State Comptroller has an institutional advantage in terms of human rights protection, since it is an institution that can act on its own initiative and actively work to realize its objective. The State Comptroller can also decide to examine the implementation of Israel's obligations pursuant to various international conventions that have not been adopted within domestic Israeli law; this also includes the provisions of the treaties for which a court is not empowered to grant relief in the event of their violation. As is known, an international treaty that has been ratified but not enacted and has not become part of the domestic law is not a binding

63 Josef Chaim Shapira Shapira, *The inaugural speech* Swearing-in Ceremony at the Knesset Plenum, (2012) (Hebrew).

internal law;[64] however, in light of the presumption that laws must be compatible and the fact that the executive branch itself has adopted the treaty, the State Comptroller can use the treaty and its provisions as an audit norm (standard) with which to examine the behavior of the audited bodies, and to examine the degree to which Israel is complying with its obligations pursuant to these treaties.[65] Additionally, the State Comptroller, when functioning as the Ombudsman, receives large amounts of information regarding human rights violations, and he thus has a considerable advantage – he is not "limited" to audits that have been initiated in advance, and has the flexibility needed to initiate real-time investigation of complaints that have been submitted to him. Through this unique structure, a compilation of specific complaints submitted to the Ombudsman's office constitutes the basis for broad systematic review of a State audit. We also note that the Comptroller is, as stated, charged not only with the examination of the legality of the body's activities, but also with the examination of its ethics, proper administration, and its compliance with the principles of efficiency and economy.[66] Each of these areas has a determinative impact on the protection of human rights. Past State Comptroller and Judge (Ret.) Miriam Ben Porat remarked on this issue when she noted that "the audit process cannot limit itself to pointing to cases in which the authority has acted in an illegal manner. The goal that the state audit seeks to achieve is an intelligent and efficient governmental authority, not just a reasonable government authority, which works in a standard and legal manner."[67] In other words, the audit institution can also examine the efficiency of various government programs and government actions, the function of which is to realize human rights, such as an examination of the efficiency of actions taken by the law enforcement authorities in

64 CFH 7048/97 *Anonymous v. Minister of Defense,* 54(1) P.D., 721, para. 3 (2000) (Isr.), per Justice Dorner: "[r]atification of an international convention which only anchors customary law does not transform what is stated in it into part of domestic law. For this, adoption of the convention by law is necessary. However, case law has established an interpretive presumption according to which the laws of the state and the norms of international law to which the State of Israel is committed are in conformity with each other, and that the laws of the State will be interpreted – as much as possible – as being consistent with international law.... This is the case, in general and all the more so in matters that relate to basic rights"; regarding the presumption that laws conform, in the context of Israel's signature of the Convention on the Rights of the Child, *see* Alon Rodas, *The best interests of the child?* Hapraklit 54, 247, 251-252 (2016) (Hebrew); Professor Barak notes in his book that when the international law has not been adopted within the country's internal law, there is special justification for maintaining the presumption that the objective of the internal law is to realize the international law and not to contradict it. *See* Aharon Barak, *Interpretation of the Law – Interpretation of Legislation,* 576 (1992) (Hebrew).

65 An example of this is the report that examined the State's ombudsman with its obligations pursuant to the Convention on the Rights of the Child, *Annual Report 64C – Handling of Minors without Civil Status in Israel* (2014).

66 State Comptroller Law, 5718-1958 [Consolidated Version] § 2 (Isr.).

67 Miriam Ben-Porat, *The State Comptroller and the Supreme Court's Case Law*, Gad Tadeski Memorial Volume – Essays in Civil Law 93, 98 (1996) (Hebrew)..

implementing the statutory provisions that relate to the protection of the rights of minors during criminal proceedings.[68]

The special advantage in the field of social rights – The institution of the State Comptroller has an advantage in handling social rights. Promoting the protection of social rights imposes an active obligation to finance the realization of social rights – which has significant budgetary implications, and is thus difficult to enforce legally.[69] The State Comptroller, therefore, has a marked advantage in protecting these rights, precisely because of the non-binding character of his findings. This non-binding nature enables the State Comptroller to ask the audited bodies to respect social rights – on both the moral and educational levels – without requiring budgets to be allocated and without specifying the sources for such budgets. Examples for this can be found in the Comptroller reports dealing with subjects such as nutritional security or public housing.[70]

The above indicates that the Israeli State Comptroller institution has the authority to undertake the job of serving as the country's NHRI, and we believe that it should indeed assume this position. Furthermore, we believe that this is its obligation to do by virtue of the Basic Law: Human Dignity and Liberty and the Basic Law: State Comptroller. Prof. Aharon Barak has taken a similar approach:

> "It is fitting – so long as there is no special legislation regarding a Human Rights Commission – that the State Comptroller – both in terms of his general functions and in terms of his function as the ombudsman – should understand that one of its positions is to be the Israeli NHRI. Indeed, one of the State Comptroller's functions is to examine the actions of the audited bodies with respect to harm done to human rights. For this purpose, the same rule will apply to violations of "civil" constitutional rights – such as freedom of expression and equality – as applies to a violation of "social" constitutional rights – such as health and education. Indeed, each constitutional right has a civil aspect. The type of harm arising would be both harm that arises from excessive action on the part of the government which can lead to harm to "negative" constitutional rights, and harm which arise as a result of deficient

68 *See* (as an example of audits of this type) the State Comptroller's Report regarding *the police handling of minors who appear to have been involved in criminal matters*, Annual Report 64C, 401 (2014).

69 Rights of these type are, therefore, classified as "positive rights", *see* Barak, *supra* note 61, at 513-522; Yoram Rabin, THE RIGHT TO EDUCATION 59, 85-86 (2002) (Hebrew).

70 *See, e.g.,* State Comptroller, *Special Comptroller's Report – Government Activity Concerning the Promotion of Nutritional Security* (2014); State Comptroller, *Special Comptroller's Report – Housing Crisis* (2015) (Isr.).

> action undertaken by the State, which is not sufficient to protect the "positive" constitutional rights".[71]

The State Comptroller must expressly and explicitly declare that his function is to protect and promote human and civil rights in Israel. As stated above, the Comptroller must transform itself into a key factor in the protection and promotion of human rights in Israel, including the making of human rights accessible to the general public through the distribution of information regarding these rights.

VI. CONCLUSION: A STEP IN THE RIGHT DIRECTION

As stated above, the State Comptroller is the most appropriate and suitable party to serve as an NHRI in Israel. Despite previous declarations that SAIs contribute to the protection of human rights,[72] they are still neither perceived as such in the minds of the Israeli public nor seen as institutions that "specialize" in the protection of human rights. Indeed, despite the human rights revolution that has taken place in Israeli law, the idea of protection of human rights has not taken a central place in the Comptroller's work. Thus, for example, the State Comptroller has not implemented the use of the principle of proportionality, on a regular basis, which is an important principle within the treatment of human rights.[73] Until Judge (Ret.) Joseph Shapira was appointed to the position of State Comptroller, in 2012, the State Comptroller's office had not even defined itself, expressly, as an institution with a broad mandate for promoting and protecting human rights. Shortly after taking office, however, State Comptroller Shapira emphasized, on a number of occasions, the importance of the State Comptroller and the Ombudsman in protecting human rights. In the introduction to the first annual report published during his term of office, Comptroller Shapira wrote as follows:[74]

> "The protection of individual rights is not something engaged in only out of good heartedness, but is instead a constitutional and legal obligation derived from the totality of the State of Israel's internal laws and the State's obligations arising from international law. The constitutional rights that are

71 Barak, *supra* note 62.

72 *See, e.g.,* the remarks of Judge (Ret.) Micha Lindenstraus in his introduction to the Ombudsman's *Annual Report* 35, 2008 (2009)(Hebrew) stating "[t]he Ombudsman's Office will persist in its efforts to justify the public's faith in it as an institution that contributes to the protection of human rights".

73 A search in the State Comptroller's website shows that the word "proportionality" appears in only about 15 documents issued by the Comptroller's office and in most of them the term was not used in the constitutional context – meaning that it was not used in the context of an analysis of the three sub-tests used for determining constitutionality.

74 The State Comptroller Annual Report 63c, *Introduction* (2012)*;* accounts for the 2011 fiscal year (2013) (Isr.).

> anchored in the Basic Laws are not a desired ideal or a superior objective; they impose legal obligations which have operative consequences for the functioning of government authorities".

After noting these important matters, Comptroller Shapira continued, in a festive statement:

I see the institution of the State Comptroller and Ombudsman as the State of Israel's National Human Rights Institution, and this will be my policy while I hold this position.[75]

These declarations constitute an important step toward the adoption of the view that the State Comptroller is a key institution for the protection and promotion of human rights, alongside his continued functioning with respect to the various forms of audit activity in all other areas such as proper administration, ethics, and the war against government corruption, and ensuring economy, efficiency and effectiveness in the actions of the audited bodies. In line with this movement, State Comptroller Shapira has published many significant audit reports dealing with issues concerning the protection of individual rights, such as nutritional security,[76] the State's treatment of foreigners and asylum seekers,[77] education for living in harmony with others and the prevention of racism,[78] nonexploitation of social rights,[79] employment of minorities and persons with disabilities,[80] and the State's treatment of the elderly in need of nursing care.[81] In these reports, he used the language of human rights and norms drawn from the Basic Laws and international treaties dealing with human rights much more extensively than had been done in the past. In addition, in the Ombudsman's reports as well, constitutional norms are increasingly being used in the handling of complaints, with the Ombudsman's report devoting a complete chapter to the subject of the protection of human rights.[82] Thus, for example, the Ombudsman has investigated complaints regarding violations of the freedom of expression due to deletion of

75 Josef Chaim Shapira, *Introductory Remarks – Conference on the State Comptroller and Ombudsman Institution in a Changing Social Environment* (2013) (Isr.).

76 The State Comptroller, *Government Activity Concerning the Promotion of Nutritional Security, Special* Comptroller's Report (2014) (Hebrew).

77 The State Comptroller *Annual Report 64c*, *Foreigners Who Cannot be Deported from Israel*, – For the year 2013 and for 2012 fiscal year accounts 2012 (2014) (Hebrew).

78 The State Comptroller, *Special Comptroller Report - Education for Shared Life* (2016) (Hebrew).

79 The State Comptroller *Annual Report 65c*, *Non-utilization of social rights*, 2014 and for the 2013 fiscal year accounts (2015) (Hebrew).

80 The State Comptroller *Annual Report 66c*, *State Actions to Promote the Integration of the Arab Population in Employment*, 2015 and for the 2014 fiscal year accounts (2016) (Hebrew); The State Comptroller Annual Report 64c, *Government Actions for the Integration of Persons with Disabilities in Employment*, for 2013 and for the 2012 fiscal year accounts (2014) (Hebrew).

81 The State Comptroller, Special Comptroller Report*, State's Treatment of the Elderly Needing Nursing Care and who Live at Home* (2017) (Hebrew).

82 *See* Ombudsman, Annual Report 43 for 2016, 37 (2017) (Hebrew).

responses from Facebook pages of public persons;[83] the investigation of a complaint brought by evacuees from the Migron settlement, which was handled based on the terms established in the Basic Law: Human Dignity and Liberty and various relevant international treaties;[84] and many additional complaints relating to the protection of individual rights.[85] The Ombudsman's report also expressly establishes that the "Ombudsman, like other ombudsman institutions throughout the world, delivers an up-to-date interpretation of its powers and sees the constitutional and legal norms regarding human rights in the State of Israel as a foundation on which the investigation of complaints must be based."[86]

Indeed, it is important to emphasize that simply using the words "human rights" is insufficient. The change must be deep and significant. The State Comptroller institution must develop professionalism regarding domestic and international human rights, and it must train its staff to deal with the handling of these issues as part of their work. There is no doubt that the step taken by the State Comptroller is heading in the right direction toward the union of the Office of the State Comptroller and Ombudsman of Israel and its NHRI, but it is a process that the Office must continually and consistently pursue. The Office's staff, other government authorities, and the public as well must internalize the understanding that the Office of the State Comptroller and Ombudsman is also the NHRI of the State of Israel.

To sum up, as a result of entering its constitutional era, beginning in the mid-1990s, Israel's legal system has been completely transformed. The Basic Laws regarding human rights enshrined the duty to protect and promote human rights as a supra-legal constitutional norm in Israel. The duty to secure the values of democracy, primarily human rights values, devolves on all government entities in the State of Israel, but the protection of human rights will not be complete without having effective protection mechanisms in place. One very important such mechanism in the field of human rights is the institution of the State Comptroller and Ombudsman. The State Comptroller has both the duty and the right to take

83 *Id.,* at p. 39.

84 *See* the Ombudsman's decision regarding the evacuation of Migron on 4 Mar. 2014, available at www.mevaker.gov.il/he/Ombudsman/NTZAbout/HachlatotNTZ/HachlataNTZ-3.4.2014-Migron.pdf.

85 Thus, for example, Comptroller Shapira noted in the Ombudsman's Annual Report for 2015 provides that "[t]he issue of respect for human and civil rights, their promotion and protection has become an integral part of the all government activities in a democratic regime. In light of the importance and centrality of human and civil rights in our life, I have decided that during my term of office as State Comptroller and Ombudsman, the institution of the State Comptroller and Ombudsman will put an emphasis on the promotion of this subject. Regarding the Ombudsman's activity, this was relatively easy decision to implement, since, from the day of its establishment, the Ombudsman's office has worked to protect the rights of those who submit their manners to it. A review of this report provides many examples of complaints in which the Ombudsman's Office prevented a serious violation of the basic rights: the right to privacy, the right to property and social and economic rights, such as the right to housing and the right to education."

86 Ombudsman, Annual Report 42, for 2015, 37 (2016) (Hebrew).

a central role in safeguarding the State of Israel's democratic values, primary of which are human rights. As part of the State Comptroller's expanded constitutional authority, he must work toward protection of human dignity and liberty. Government entities can operate with impressive efficiency; they can operate on the basis of thrift, proper administration, accuracy and effectiveness. Nevertheless, there is no purpose in proper administration if it is not based on appropriate democratic values, foremost among them being the protection and securing of the rule of law and human rights.

The institution of the State Comptroller and Ombudsman must be sensitive to the people's state of mind, and their needs, and it must be the "people's defender". There can be no proper State audit, and the public's complaints cannot be properly investigated without a focus on rights, of which the chief ones are human rights and rights concerning human dignity. Today, Israel has no other entity other than the institution of the State Comptroller that can initiate and systematically conduct socioeconomic audits. The institution of the State Comptroller meets the definition of a **national institution**, **which is not judicial and which deals with human rights**. Moreover, it satisfies the Paris Principles. Following the initial and significant step taken by the State Comptroller – that he is taking upon himself the role of the Israeli NHRI with the commensurate preparation of audit reports and investigation of complaints – he must work to ensure that his staff internalizes the issue of handling and protecting human rights, which will thus complete the path along which he has begun to move – a short but necessary path.

State Audit Work that Raises a Suspicion of Criminal Conduct – the Case of Israel

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Introduction

In course of an audit, the State Comptroller often discovers facts which suggest the possibility of criminal conduct. However, in Israel, the State Comptroller does not have legal authority to carry out criminal enforcement or investigatory activity. According to Section 14(c) of the Israeli State Comptroller Law 1958 [Consolidated Version] (hereafter: the "State Comptroller Law"), when a suspicion arises regarding the possible commission of a criminal act, the State Comptroller is required to notify the Attorney General. This phenomenon is hardly unique to Israel. Many countries have defined procedures for dealing with suspicions that arise during the work of the supreme audit institution [hereafter: "the SAI" or "the SAIs", as relevant] regarding possible criminal conduct.[1] Examples of such procedures, as they are used in other legal systems, are presented below - in their specific relevant contexts.

Thus, over the years, pursuant to Section 14(c), when suspicions of criminal acts have arisen during the course of the State Comptroller's work in conducting audits - these suspicions have been brought to the attention of the Attorney General.[2] In some cases, the notifications are then followed by the Attorney General ordering an investigation, and some of these investigations have led to criminal trials[3] or disciplinary hearings.[4] Despite its seeming simplicity, the language of section 14(c) often raises various questions of interpretation affecting the state audit work, as well as the reciprocal and working relationships among the State Comptroller, the Attorney General, and the Israel Police. This essay will discuss a few of the interpretation issues that are inherent in Section 14(c), as

1 We conducted a survey among the SAIs of several countries, regarding the process through which state audit institutions handle suspicions arising during the course of an audit, regarding the commission of a criminal act. As part of the survey, we asked the following questions of the various SAIs included in the survey: "As part of a study being undertaken by our Office, we are examining the various ways different legal systems deal with criminal matters uncovered in the course of an audit undertaken by the SAI. If possible, we would very much appreciate if you could clarify for us how your Office deals with situations in which an audit reveals suspected criminal activity; please refer us to the relevant sections of legislation (and any written guidelines and academic material, if it is not too much trouble) that deal with this issue." The SAIs of India, Japan, Poland, Hungary, and the United States were gracious enough to respond with highly detailed answers. In addition, we obtained information about Serbia, Portugal, Germany, the Czech Republic, Greece, Slovenia, and Italy - from the following sources: National Audit Office, State Audit in the European Union (2005) (UK); Kristin Reichborn-Kjennerud, Thomas Carrington, et al, *Supreme Audit Institutions' Role in Fighting Corruption,* Paper for the 15th Biennial CIGAR Conference 2015 in Valletta, Malta 4-5 June, 2015 (2015). These data were verified by an examination of the relevant laws of the various countries.

2 Obviously, the examples in this essay do not refer to cases that are still being examined by the Attorney General.

3 See, e.g., the widely covered court decision in the criminal prosecution of the then Director-General of the Interior Ministry, Aryeh Deri, CrimC 1872/99 (Jerusalem) *State of Israel v Deri* (published in Nevo, September 24, 2003); see also, the verdicts in the *Hevroni* case, *infra* note 67, at pp. 94 and 101, discussed below.

4 At times, the State Comptroller informs the Attorney General of suspicions regarding the commission of a criminal act, but the Attorney General decides that only a disciplinary hearing is required.

well as the ways in which the section's language interacts with other relevant legal texts. The objective of this article is thus to present the first research regarding the problems arising in the Section 14(c) context, and their effect on the state audit process and on the State Comptroller's relations with the State Attorney's office and with the Israel Police (hereafter: "the Police").[5]

1. Legislative History: The Development of Section 14(c) of the State Comptroller Law

The reporting mechanism currently set out in section 14(c) of the State Comptroller Law has undergone several transformations over the years. Section 10(c) of the State Comptroller Law of 1949, the original version of the statute, provided that "the Comptroller **may** […] notify the Attorney General […] in the event that he finds suspicion that a criminal conduct has been committed" (emphasis added).[6]

Section 10 was changed by the 1958 amendment of the original law. After the amendment, Section 10(c) read as follows: "should the audit reveal that the audited body behaved in a way that raises a suspicion of criminal activity, the Comptroller **shall notify the Attorney General of the matter**" (emphasis added).[7] That same year (1958), the section was included in the law's consolidated version and, because of the new numbering, it became the consolidated statute's Section 14(c).[8]

In 1966, the language of Section 14(c) was changed yet again, and the following text was added: "The Attorney General will inform the Comptroller and the Committee on the manner in which the matter was handled, within six months of being notified."[9]

Due to an additional amendment enacted in 2001, the phrase "should the audit reveal that the audited body behaved in a way that raises a suspicion of criminal activity" was replaced

5 There is very little discussion of Section 14(c) in the legal literature. In her book, BASIC LAW: THE STATE COMPTROLLER (2005) (in Hebrew), Miriam Ben-Porat refers to the section only a few times (at pp. 99, 236, 264, 313, 321). The only legal article written about Section 14(c) to date was published in the mid-1970. See, Shmuel Hollander, "A Suspicion Regarding a Criminal Act: Section 14(c) of the State Comptroller Law" (Hebrew), 24 STUDIES IN STATE AUDIT, 17 (1975); see also the brief reference to the section in an essay by former State Comptroller Yitzhak Ernst Nebenzahl, "The Significance of 'Incorruptibility' in the State Comptroller Law," 133, Paragraphs 3-4, in *Gedenkschrift in Memory of Avraham Vinshel* (Naftali Lifshitz, Yitzhak Ganon, and Reuven Hecht, eds., 1977) (in Hebrew).

6 Section 10(a) of the State Comptroller Law, 1949, SH [*Sefer Hahukim* – Israel Laws] 8 (May 24, 1949).

7 Section 10(c) of the State Comptroller Law, 1958 (Amendment), SH 245, 76.

8 State Comptroller Law, 1958 [Consolidated Version], SH 248, 92.

9 State Comptroller Law (Amendment No. 30), 1996, SH 1572, 134.

by "[i]f the audit work gives rise to a suspicion that a criminal act has been committed."[10] The explanation originally given for the proposed amendment was that, "[i]n practice, in most cases in which the State Comptroller notifies the Attorney General of a suspicion regarding a criminal act, the act is not that of the audited body itself, but rather that of an employee or official in that entity or in a different entity"[11], requiring an amendment of the statutory language.

The most recent amendment of Section 14(c) was enacted in 2007, adding a reference to disciplinary infractions. It provides that the State Comptroller may inform the Attorney General if the audit raises a suspicion of "a disciplinary violation as defined by law."[12] Thus, in the current version of the State Comptroller Law, Section 14(c) reads as follows:

> "If the audit work gives rise to a suspicion that a criminal act has been committed, the Comptroller shall notify the Attorney General of the matter and may do so if the audit work gives rise to a suspicion that a disciplinary infraction as defined by law has been committed; the Attorney General will inform the Comptroller and the Committee of the manner in which the matter was handled within six months of being notified."[13]

2. Interpretation of Section 14(c) of the Law

Each phrase of Section 14(c) presents questions of interpretation that require clarification. We shall discuss all of these, according to the order of their appearance in the text.

10 State Comptroller Law (Amendment No. 33), 2001, SH 1781, 174.

11 Draft amendment of the State Comptroller Law (Amendment 33) of 2001, HH [*Hatz'aot Hok* – Proposed Laws] 2977, 498.

12 State Comptroller Law (Amendment No. 39), 2007, SH 2121, 66.

13 See and compare a parallel arrangement in Chapter 7 of the State Comptroller Law, which establishes the limits of the State Comptroller's authority and the manner in which the Comptroller may act, as Ombudsman. Section 43(d) of Chapter 7 provides as follows: "When the investigation of [a] complaint gives rise to a concern that a criminal offence has been committed, the Ombudsman shall bring the matter to the knowledge of the Attorney General; and he may do so when the investigation of a complaint gives rise to suspicion that a disciplinary offence has been committed pursuant to any law. The Attorney General shall inform the Ombudsman and the Committee, within six months from the day that the matter was submitted to him, of the manner in which he has dealt with the subject." Although these are parallel sections – one places the burden of notification on the State Comptroller and the other refers to notification by the Ombudsman – this essay discusses section 14(c), but not Section 43(d).

A. "If the audit work gives rise to …"

The phrase "[i]f the audit work gives rise" imposes on the State Comptroller a duty to notify the Attorney General of any matter which is discovered in the course of work being done in preparation of an audit, and which gives rise to a suspicion that a criminal act has been committed.[14] Although at first glance, this phrase appears to be simple and clear, two basic questions arise regarding its interpretation. First, must the suspicion that a criminal act has been committed arise as a direct consequence of the audit itself, or will the reporting duty also apply to any suspicion arising as a result of the handling of other matters at the institution under audit? Second, is it only information or a suspicion regarding the commission of a criminal act that was discovered directly by State Comptroller employees themselves that should be brought to the Attorney General's attention? Or should the Attorney General be notified regarding any suspicion regarding the commission of a criminal act that was brought to the attention of the auditors, while they were working at the institution under audit?

With regard to the first question, the policy of the State Comptroller's Office, based on an opinion issued by the Office's own Legal Department[15], is that the phrase "[i]f the audit work gives rise" should be broadly interpreted,[16] so as to include all information giving rise to suspicions of criminal acts that has come to the attention of State Comptroller personnel through their work in the audited institution.[17]

As for the second question, it is not appropriate for the State Comptroller's Office to be required to serve as a conduit for providing information to the investigating authorities, and employees in the audited institutions should not be encouraged or incentivized to provide information to audit personnel if that information is not substantively relevant to the audit. The State Comptroller's Office does not operate as an intelligence gathering unit for the Police and thus, whenever necessary, individuals are told to notify the police directly about their suspicions or knowledge regarding criminal acts.

14 Similarly, in this context, the German law provides that if suspicions arise during the course of audit work, they must be reported. But the law specifies that the suspicions must have arisen "in the course of field work." See "Audit Rules of the Bundesrechnunshof," Section 27(3); in contrast, the formulation in the law regarding the Japanese SAI is broader, and refers to findings that are "as a result of its audit"; see Sections 31-33 of the Board of Audit Act (Jp).

15 Hereafter, all references to the Legal Department refer to the legal department of the State Comptroller's Office.

16 The question of whether the State Comptroller is **obligated** to bring suspicions about the commission of a criminal act to the Attorney General, or whether the State Comptroller has the discretion to decide whether or not to report such suspicions, will be discussed below.

17 "The policy of providing materials to the Attorney General in accordance with Section 14(c)", at p. 3 (internal opinion issued by Atty. Tzipora Schlezinger, August 4, 2002) (opinion held in the Legal Department's archive).

In this context, we should note that occasionally, materials and information raising a suspicion that a criminal act has been committed are indeed submitted to the State Comptroller's Office in a context that is not a part of the audit of an audited institution (i.e. in situations in which the condition implicit in the phrase "[i]f the audit work gives rise …" has not been met). For example, ordinary citizens – sometimes anonymously – write to the State Comptroller's Office to describe their suspicions regarding the possible commission of criminal acts. Despite the understandable policy of not encouraging the State Comptroller's Office to serve as a conduit for delivering materials relating to possible criminal acts to the Police, and because of the need to behave responsibly vis-à-vis the public, such information is brought to the Attorney General's attention – but this is done outside of the channel of communications described in Section 14(c) (and outside of the parallel practice described in Section 43(d) of the law).[18] When letters dealing with such suspicions are referred to the Attorney General, the State Comptroller makes it clear that the State Comptroller's Office has no information about the materials' reliability and that the materials are submitted to the Attorney General to do with as he sees fit. Clearly, the use of this non-statutory channel means that the Attorney General is not required to inform the State Comptroller of how the matter is handled within six months of notification (as he is required to do with regard to information that is provided pursuant to Section 14(c)).

B. "…a suspicion…"

What sort of concern will qualify as a "suspicion" that a criminal act has been committed as that term is used in Section 14(c) of the State Comptroller Law?[19] What is the level of evidence required to form the basis for the auditors' suspicion that a criminal act has been committed, so as to justify notification of the Attorney General? The statutory language does not provide a definitive answer to this question, and does not make clear whether the level of evidence must equal that which is sufficient for issuing an indictment pursuant to Section 62(a) of the Criminal Procedure Law.[20]

The question of the strength of evidence needed to justify a notification of the investigating authorities (e.g. the Attorney General) is an issue for SAIs in many countries. A study

18 The State Comptroller's Office refers to such notifications as "notifications not based on Section 14(c) of the Law."

19 The threshold set by the Polish law is "reasonable suspicion," whereas in Hungary the threshold is described as "grounds to suspect." See, respectively, Supreme Audit Office Act (Pln), and Act LXVI on the State Audit Office of Hungary of 2011 (section 30).

20 Section 62(a) of the Criminal Procedure Law [Consolidated Version], 1982, (hereafter: "the Criminal Procedure Law"), provides as follows: "If the prosecutor to whom the investigation materials were sent sees that the evidence suffices to indict an individual, the prosecutor will indict that person, unless the prosecutor is of the opinion that there is no public interest in holding a trial."

published in 1999 showed that there are three approaches generally taken by SAIs when encountering a suspicion that a criminal act has been committed.[21] The author's findings were as follows:

> "SAI action on suspected fraud generally falls into three categories, each with its own strength and weakness. One course of action calls for immediate referral of questionable activity to the appropriate legal authority. Immediate referral puts potential criminal matters squarely in the hands of those best qualified to pursue them – trained investigators. However, matters that initially appear suspicious may have reasonable explanations, and this course of action could involve legal authorities unnecessarily.
>
> "A second approach – making referrals for investigation only after fraud indicators are clearly identified and confirmed through extended audit steps – resolves the issue of involving legal authorities in matters that are not criminal. However, this approach risks losing time, revealing the potential investigation to those involved, and perhaps tainting the evidence.
>
> "In the third course of action, the SAI investigates the matter to confirm an illegal act. The advantages of this approach – timeliness and confidentiality – are achieved because the initial investigation remains within the SAI's control. However, the investigation itself can be successful only if the SAI has the authority, resources, and expertise necessary to carry out the investigation."[22]

The difficulties attendant to each of the methods described above are a cause of concern for the SAIs of many countries. One concern is that the slow, convoluted manner in which suspicions are reported to enforcement authorities effectively allows the audited institutions to conceal, eliminate or obliterate the evidence pointing to the criminal act. To confront this difficulty, some SAIs have established audit units specializing in gathering forensic evidence and identifying and investigating indications of criminal acts. Other SAIs have created mechanisms that involve the investigating authorities immediately after a suspicion arises that a crime might have been committed.[23]

Regarding this issue, Shmuel Hollander, who served as Deputy Legal Adviser to the State Comptroller[24] during the 1970's, wrote as follows: "It is not sufficient that there is merely a

21 Magnus Borge, *The Role of Supreme Audit Institutions (SAIs) in Combating Corruption*, 9th International Anti-Corruption Conference, 10-15 October 1999, Durban, South Africa (1999). These three approaches are also relevant to the question of when law enforcement should be contacted, an issue that we will discuss below.

22 *Ibid*, at p. 18.

23 *Ibid*.

24 Hereafter, unless otherwise indicated, all mentions of the Legal Adviser or a Deputy Legal Adviser will refer to those holding or who held that position within the State Comptroller's Office.

theoretical possibility of a criminal act, but it is also doubtful if the audit personnel can be asked to provide the Attorney General with the full scope of evidence required for the conviction of a crime, which is a quantity of evidence likely to persuade the court of the defendant's guilt beyond a rational doubt. This is a threshold that the audit cannot and must not be asked to meet."[25] Given this dilemma, Hollander proposed adopting the following yardstick: "If there is 'the beginning of evidence,' i.e. certain reasonable level of evidence regarding the matter that a crime may have been committed, the Comptroller will notify the Attorney General."[26] Yosef Sapiria, who served as the Legal Adviser during the 1980's, suggested the following test: "By law, it is not the Comptroller's function to produce irrefutable proof of a criminal act; it is sufficient if the audit's findings indicate suspect circumstances and, in the Comptroller's opinion, raise a suspicion warranting the Attorney General's attention."[27] Despite a certain difference between them, we feel that Hollander's and Sapiria's formulations are appropriate, and that the criteria created by the word "suspicion" as set out in Section 14(c) should be understood as requiring that the level of evidence needed to establish a "suspicion" is less than that required of a prosecutor when issuing an indictment. This is because a police investigation will, presumably, take place after the audit materials are submitted to the Attorney General, and the police have many more means available to them for gathering evidence than are available to the State Comptroller's Office.[28]

25 Hollander, *supra* note 5, at p. 21. The term "rational doubt" was probably meant to refer to the equivalent phrase "beyond a reasonable doubt," which is the term used in Section 34V(a) of the Israel Penal Code, 1977 (hereafter: "the Penal Code"), to establish the level of evidentiary proof required for a criminal conviction. There have been situations in which the State Attorney's office felt that the State Comptroller notified the Attorney General of material that was insufficiently "ripe" for notification pursuant to Section 14(c), and the Comptroller's Office was consequently told, in light of this, to complete the audit examination. See a letter dated May 11, 1984, from the Legal Adviser, captioned "Applying Section 14(c) of the State Comptroller Law": "While, until today, I worried that the Attorney General and police were dissatisfied with us for not bringing enough cases to their attention, the truth of the matter is that the two notifications in question indicate that, in the opinion of the State Attorney, we are submitting matters that are not 'ripe' and do not warrant the use of Section 14(c). One of Dr. Ben-Or's [at that time, a senior deputy State Attorney] letters includes a request that we complete the examination to determine whether or not the claim was baseless – a task that I feel is not within our remit."

26 *Ibid.*

27 Letter from the Legal Adviser, dated May 11, 1984, to the Attorney General, captioned "Section 14(c) of the State Comptroller Law," (held in the Legal Department's archive).

28 Hollander, *supra* note 5, at p. 20.

C. "…that a criminal act has been committed…"

The phrase "criminal act" is hardly commonplace statutory language. Even when this law was passed, it was not routinely used in Israeli legislation.[29] It would seem then that the phrase means not only a "criminal act," but also a "criminal omission" given the use of the broad word "act," currently appearing in Section 18(b) of the Israeli Penal Code 1977 (hereafter: the "Penal Code").[30] Given the above, it would seem appropriate to interpret the phrase "criminal act" as parallel to the word "**crime**"[31], as it is commonly used in the general part of the Penal Code and in criminal legislation generally, and which is defined in Section 1 of the Interpretation Order [New Version] as "an act, attempt, or omission, warranting a penalty."[32] Furthermore, the word "crime" includes three levels of severity – felony, misdemeanor, and transgression.[33] We will refer below to the question of whether or not the State Comptroller must notify the Attorney General regarding the suspicion of any act that could be included in the word "crime" – even crimes at the level of a transgression.

D. "…the Comptroller shall notify the Attorney General of the matter…"

As noted above, the relevant phrase in the original 1949 formulation of the section read as follows: "the Comptroller may […] notify […] the Attorney General of the matter."[34] In 1958,

29 Hollander addressed this in his essay, *supra* note 5, at p. 17: "Here, the legislature used a unique expression that is not in customary use in other pieces of legislation."

30 Section 18(b) of the Penal Code provides that – in the absence of a specific provision in the statute providing otherwise – the word "act" includes an omission. See also, Yoram Rabin and Yaniv Vaki, CRIMINAL LAW (in Hebrew), Vol. 1, pp. 206-239 (third edition, 2014).

31 Indeed, Section 43(d) of the State Comptroller Law, enacted later than Section 14(c), uses the word "crime" rather than "act."

32 Whereas the word "penalty" is defined in Section 1 of the Interpretations Order [New Version] as a "fine, imprisonment, or any other penalty."

33 The division into three levels of severity is set out in Section 24 of the Penal Law. This is an issue that other countries have approached with varying levels of specificity, but primarily in terms of defining the areas regarding which the SAI has authority to take action with respect to criminal matters. For example, in India, the SAI's authority to deal with criminal issues is limited to fraud and corruption. See STANDING ORDER ON ROLE OF AUDIT IN RELATION TO CASES OF FRAUD AND CORRUPTION (Ind). Other countries have established that the SAI can intervene in a specified group of criminal matters ("misdemeanor, criminal offense, crime"); these countries include, Japan, Poland, Germany, Greece, and Slovenia. Still other systems expand the SAI's authority to intervene in illegal acts that are not necessarily criminal - e.g. Hungary ("illegal acts"), Serbia ("damage to public property"), and the United States ("serious wrongdoing in federal programs or operations").

34 *Supra* note 6.

this language was replaced by the phrase "will notify the Attorney General of the matter."[35] Thus, the legislature replaced a term denoting choice with one denoting an obligation.[36] In any event, the current phrase – "will notify" – must be understood properly in order to be applied, and there appear to be two possible interpretations of the term:[37]

One approach is to view the statutory language introduced by the amendment ("will notify") as removing any possibility of an exercise of discretion – as language that places the State Comptroller under an absolute obligation to notify the Attorney General of **any** suspicion that a criminal act may have been committed, even if the suspicion itself is slight or if the circumstances are such that the chances of an indictment are minimal, or if the situation is such that proceedings outside of the criminal justice system would seem to be more appropriate. Going beyond the statutory language, this approach (i.e., of not allowing the Comptroller the ability to not report a suspicion) would seem to be justified in light of the fact that in the Israeli system it is the Attorney General who decides when to initiate a criminal investigation; the State Comptroller must not encroach on the Attorney General's authority or make decisions that are part of the Attorney General's mandate. Furthermore, the Attorney General has the discretion to establish, from time to time, a specifically stringent or lenient policy with respect to the initiation of proceedings regarding certain crimes or in the presence of certain circumstances, and the State Comptroller will not necessarily be aware of that policy.

The **other** interpretation is one that grants the State Comptroller a certain amount of discretion in implementing the notification power. If he applies this interpretation, the State Comptroller may take certain matters into consideration before notifying the Attorney General of a suspected criminal act – such as the chances that an investigation will not

35 *Supra* note 7. Many countries have established a mechanism through which the SAI must notify the Attorney General of corruption or criminal acts. A report by the Economic Institute of the World Bank, concerning the importance of SAIs with regard to the fight against corruption, notes that the following countries impose an obligation on their SAIs to report acts of corruption or of crimes that they discover: the United States, the Philippines, Bhutan, Indonesia, Malaysia, Spain, Romania, Moldova, China, Estonia, Lithuania, Germany, the Netherlands, Sweden, India, the United Kingdom, South Africa, the Czech Republic, and Slovakia. See Kenneth M. Dye & Rick Stepenhurst, *The Importance of State Audit Institutions in Curbing Corruption*, THE ECONOMIC INSTITUTE OF THE WORLD BANK 14 (1998).

36 Different countries have different statutory formulations concerning the scope of the discretion that the SAI can exercise with respect to the notification of the enforcement authorities. Some – like Japan – have used the formulation "it must notify"; the law in Serbia includes the phrase "required to submit without delay". In other countries, the language establishing the duty to report is less definitive - e.g., Poland's and Hungary's laws both use the term "shall notify". By contrast, other countries describe the SAI's authority in terms of exercising judgment; e.g. in Germany, there is an obligation to notify the senior audit personnel of suspicions about criminal acts so that they may "decide on the next step to be taken." The answer we received from the SAI in the United States (the Government Accountability Office, referred to hereafter as the GAO) to our question concerning this issue (described in note 1 above), indicates that in the United States, the matter of notifying the authorities is not deemed to be obligatory, but is instead a matter the SAI's policy.

37 The two approaches were set out in the legal opinion by Atty. Tzipora Schlezinger, *supra* note 17, at p. 3.

actually be initiated (as well as the chances the matter will not come to trial or that a conviction will not be achieved); the severity or triviality of the crime (the option of not notifying the Attorney General of *de minimis* issues);[38] the amount of time that has passed since the possibly criminal act was committed; and the issue of whether the statute of limitations applies to the act in question; the damage that may be caused by the notification itself;[39] the fact that the Police are already investigating the matter; the definite knowledge that the provision of the possibly incriminating materials to the Attorney General will not result in any operative measure being taken.[40] The justification for this interpretation lies in the independence of the State Comptroller and the broad scope of the discretion that the statute allows the State Comptroller regarding the fulfillment of his function. It would be inappropriate for the State Comptroller to function mechanically in this context and to ignore relevant circumstances in implementing the statutory reporting mechanism. It is well-known that Israel's law enforcement system is seriously overworked, and if it is clear there is no justification for starting an investigation into a particular case (for any of a variety of possible reasons), the State Comptroller must avoid burdening the system with pointless notifications and submissions. An even worse outcome than the absence of notification is one in which an individual who is suspected of wrongdoing will view the Attorney General's decision not to initiate an investigation or to indict as a "victory" and proof of his innocence. Sometimes, when serious findings are published in the State Comptroller's report, it is preferable for the Comptroller's Office to refrain from making a separate section 14(c) notification. In this way, the Office avoids a result in which the report itself is overshadowed by the Attorney General's decision not to initiate an investigation, or not to issue an indictment regarding the subject of the notification.

In practice, the State Comptroller has always interpreted the "will notify" statutory language as granting the Comptroller's Office a certain amount of leeway in the exercise of this power, allowing him to consider several relevant factors before notifying the Attorney General of the suspicion that has arisen: the chances of an investigation being initiated; the

38 The *de minimis* defense is set out in Section 34Q of the Israeli Penal Code, according to which no person will bear criminal responsibility for an act if, given the nature of the act, its circumstances, outcomes, and the public interest – it of minor importance. For more on the *de minimis* defense, see Rabin and Vaki, CRIMINAL LAW (in Hebrew), Vol. 2, *supra* note 30, at p. 939 *et seq*.

39 For example, the potential harm arising from the disclosure of a whistle-blower's identity; in addition to the harm that could arise from the exposure itself, such an event might lessen the public's trust in the institution of the State Comptroller.

40 For example, the delivery of materials about the suspicion over the commission of a criminal act, for which people are generally not brought to trial.

severity of the suspected criminal act;[41] the passage of time since the commission of the act; and the public interest in the prosecution of the suspected criminal act.[42] Moreover, this approach has generally reflected the opinion of the Attorneys General themselves.[43]

Thus, the practice for many years has been that although the State Comptroller theoretically notifies the Attorney General of every suspicion arising during audit work concerning the commission of criminal acts, he does exercise **discretion before making such notifications,** in that he considers factors such as those listed above, along with various other relevant elements. It is our opinion that this approach, enshrined in many years of practice, reflects an appropriate, balanced interpretation of the rule established in Section 14(c) of the State Comptroller Law.

Submission of the final report instead of notification pursuant to Section 14(c) of the law: It has also been suggested that when a final report raises a clear suspicion that a criminal act has been committed, the obligation imposed by Section 14(c) has been satisfied when the final report itself is submitted to the Attorney General. For example, in a letter sent to State Comptroller Nebenzahl in May of 1973, Attorney General Shamgar stated that,

41 For example, internal correspondence of the Office of the State Comptroller indicates that the Office does not generally notify the Attorney General of technical income tax violations (letter dated November 15, 1965, from the Director of the Local Government Audit Department, to Bentzion Yagid, captioned "File 445 'Submitting Findings to the Attorney General'", held in the Legal Department's archive).

42 Since at least the 1960's, there has also been a policy of not notifying the Attorney General regarding a suspected act that has taken place in the recent past and was corrected immediately (letter dated August 5, 1966, from the Legal Adviser to the Director of the Local Government Audit Department, captioned "The Yarkon River Tributary Drainage Authority: Income Tax Deduction" - held in the Legal Department's archive); or when the State Comptroller does not have "an initial sense" that there is likely to be a criminal investigation (letter dated November 15, 1967, from the Legal Adviser to the Director of the Planning and Reporting Unit, held in the Legal Department's archive). In general, the position taken at the State Comptroller's Office is that a certain level of judgment must be exercised in choosing which matters to bring to the attention of the Attorney General. In cases in which there is no realistic chance that other significant evidence leading to a possible conviction will be brought to light, the Legal Adviser wrote in 1998, the public's faith in the criminal justice system could be adversely impacted if there is no consequent prosecution or penalty. (Atty. Bass's opinion, "48th Annual Report: Government Contracts with Egged," dated September 1, 1998, held in the Legal Department's archive).

43 For example, in a meeting held on November 29, 1966 in the State Comptroller's office, attended by the Attorney General and the State Attorney, the Attorney General asked "to be notified of an incident only when the State Comptroller has an initial sense that the matter warrants a criminal investigation in terms of the public interest." However, there have been Attorneys General who took a different approach. See, e.g., a letter dated December 22, 2014, from the Attorney General's assistant, Adi Menachem, captioned "The State Comptroller's Authority According to Section 14(c) of the State Comptroller Law 1958" (held in the Legal Department's archive). In the letter, Menachem criticizes the State Comptroller's Office, as follows: "We should like to point out that, in accordance with Section 14(c) of the law, when the State Comptroller is of the opinion that the audit work has given rise to a suspicion regarding the commission of a criminal act, the State Comptroller is bound by the obligation to notify the Attorney General. The wording of the law is quite clear, in our opinion […] Clearly, the Attorney General is empowered to examine, of his own initiative and as he sees fit, the matter in the report that gives rise to a suspicion regarding the commission of a criminal act. However, this does not and cannot replace the exercise of the State Comptroller's authority, as required pursuant to Section 14(c), to notify the Attorney General whenever the State Comptroller is suspicious regarding a possible criminal act."

after reading the Comptroller's final annual report, he had understood the need to initiate criminal or disciplinary investigations or proceedings regarding certain matters that were mentioned in the report, even though they had not been specifically brought to the Attorney General's attention pursuant to Section 14(c).[44] The summary of an internal meeting held in the State Comptroller's office on November 15, 2006, mentions, among other things, an instruction given that if the report has been completed and the suspicion about criminal acts is evident in the report itself, no separate notification to the Attorney General should be made, and the State Comptroller should only submit the final report to the Attorney General.[45] This view that the final audit report should be allowed to "speak for itself" has continued to be supported throughout the years at the State Comptroller's office.

The timing of the notification sent to the Attorney General: Section 14(c) provides that the State Comptroller will notify the Attorney General when the work on the preparation of an audit gives rise to a suspicion that a criminal act has been committed. However, the section does not specify the chronological stage of the audit work at which the Attorney General should to be notified that a suspicion has arisen. Should notification take place shortly after State Comptroller's Office personnel determine that the findings being assembled give rise to the suspicion? Or should the notification be given at a more advanced stage of the audit? Or when the audit report is complete?

The uncertainty regarding the proper timing for notifying the Attorney General stems primarily from the fact that immediate notification regarding a suspected criminal act might prevent the audit from continuing (because of the concern – described above - regarding possible obstruction of the police investigation), which would prevent the State Comptroller from fully formulating the audit's findings regarding those facts.[46] However, the Comptroller also needs to avoid a situation in which the findings find no expression anywhere – neither in a criminal proceeding, nor in the State Comptroller's own final report. Such a situation might occur if the audit itself is stopped because the matter was submitted to the Attorney General, and the Attorney General subsequently chooses not to order the opening of an investigation.

44 Attorney General Shamgar's letter, dated May 10, 1973, to State Comptroller Nebenzahl (held in the Legal Department's archive).

45 A summary of the discussion on November 15, 2006, is preserved in the archive of the Legal Department of the State Comptroller's Office.

46 In Japan and India, the audit is continued even if evidence of fraud or any other crime comes to light, and the SAI will emphasize the findings regarding the discovery in the audit report. In the United States, the audit will continue unhindered, but the GAO will coordinate with law enforcement authorities after noting the possible influence that the crime or fraud may have had on the investigation process (written answers provided by various states to the question, as described above, *supra* note 1).

We support the existing policy regarding the proper time for notifying the Attorney General of a suspicion that a criminal act has been committed, as reflected in a decision reached at the conclusion of the internal State Comptroller's Office discussion in 2006. This policy decision involved the categorization of different notifications into four types, each with its own method of notification. The **first situation** is one in which an incidental suspicion arises regarding criminal conduct when the report is still incomplete – in which case the report should be completed, and only then should the material be submitted to the Attorney General. The **second situation** is one in which a suspicion arises which is directly related to the issue at the heart of the report, before the report is complete – in which case it is necessary to examine the option of completing the report. In these situations, the Attorney General should be notified of the suspicion of the possible commission of a criminal act pursuant to Section 14(c) only if continuing the audit might harm the public interest. In exceptional cases, when there might be an attempt to obstruct the investigation, the possibility of holding an informal consultation with the Attorney General should be examined. The **third situation** is one in which the report has been completed and the suspicion arises from the report itself – in which case there will be no notification of the Attorney General based on Section 14(c); the public report will be submitted to the Attorney General who will decide if an indictment should be issued. Finally, there is a **fourth situation**, in which the report has been completed and a suspicion arises from information that has not been explicitly stated in the report and which cannot be inferred from the report – in which case, the information will be submitted to the Attorney General based on Section 14(c). In any case, this categorization is non-binding, and each case must be examined individually on its merits.[47]

Thus, as the statute does not specify the time frame, each case must be judged on its own merits; it is important to weigh the interest in timing for the notification preventing obstruction of a criminal investigation against the interest in publicizing the findings in the report. While the State Comptroller's reports do not deal with the criminal aspect of improper acts or omissions, the same factual foundations establishing criminality in such cases will also indicate administrative malfeasance, which may be of great public importance. It is therefore essential to include the findings in the audit reports, especially if there is doubt that the suspicions that have arisen will actually lead to a criminal trial. If the Attorney General is notified of the suspicion of the commission of a criminal act only at the end of the audit work, the continuation of the audit work concerning a criminal matter might disrupt, delay, or damage any future investigation. We therefore feel that whenever the audit work leads to a suspicion that there has been some type of criminal conduct, the State

47 Summary of the discussion of November 15, 2006, *supra* note 45. The summary of the discussion was translated into a draft of directives, but there is no reference to the draft having been completed or disseminated among the office's personnel.

Comptroller's Office personnel should inform the Legal Department, which will determine whether continuing the audit might disrupt a possible future criminal investigation. Based on current practice, whenever there is any doubt, the Legal Adviser undertakes an informal examination together with the Attorney General or with other investigative personnel, for the purpose of determining whether there is good reason for the audit to conclude its handling of the matter. If it is determined that the very fact that the State Comptroller personnel are examining the relevant matter might cause the audited body to attempt to conceal information or tamper with evidence – and that this would damage a future investigation – the Attorney General must be informed of this at an early stage, when these suspicions are first formed. However, we believe that if there is no cause to be concerned about possible obstruction, the process should be as follows: after the suspicion regarding a criminal act arises, the State Comptroller's Office should complete its audit work, and formulate the final report - which will include the findings relating to the relevant nexus of facts - and only then, after the report is published, the Office will notify the Attorney General. The Attorney General can then decide if it is necessary to take further action at the criminal level. This model ensures that the important findings are included in the State Comptroller's report; if the need arises and the relevant conditions are met, the findings will also be submitted for investigation, and the possibility of issuing an indictment will be examined.

E. "…and may do so if the audit work has given rise to a suspicion that a disciplinary infraction, proscribed by law, has been committed …"

As noted above, Section 14(c) was amended in 2007 to include a clause providing that the State Comptroller may notify the Attorney General that a suspicion has arisen – in the course of work on an audit – regarding the possibility that a disciplinary infraction, proscribed by law, had been committed.[48]

The explanation accompanying the draft amendment noted the following: "At times, the audit findings give rise to a suspicion that a disciplinary infraction has taken place; furthermore, the line between the criminal nature and the disciplinary nature of a specific behavior is often blurred. As a matter of policy, it is the State Comptroller's practice to bring

48 State Comptroller Law (Amendment No. 39), *supra* note 12. In other countries as well, the practice is to notify the competent authorities about a disciplinary infraction. For example, Section 31 of the law in Japan, *supra* note 14, makes separate reference to disciplinary infractions; Section 27(3) of the German law, *supra* note 14, includes a directive both for criminal and disciplinary matters. Nonetheless, the party that must be notified, i.e. the competent authority, is not necessarily a law enforcement body. The Japanese law, for example, provides that disciplinary infractions be reported to the entity in charge of the ministry where the infraction was discovered.

such matters to the Attorney General's attention, even if such notification is not mentioned in Section 14(c). The language of that section is distinguished from Section 43(d) of the law, relating to the Ombudsman; Section 43(d) states explicitly that even if the suspicion that has arisen relates [only] to a disciplinary infraction, the Ombudsman may notify the Attorney General."[49]

It should be noted that with regard to the notification of the Attorney General about disciplinary infractions, the statute uses the word "may," which makes the issue of notification a matter that is subject to the State Comptroller's discretion. Since the adoption of the 2007 amendment, the Comptroller's policy has been that the Attorney General should be notified of the suspicion of a disciplinary infraction only on rare occasions, for two reasons. First, the State Comptroller audit reports that include suspicions regarding disciplinary infractions outnumber, significantly, the reports that include suspicions concerning the commission of criminal acts. Thus, if the Attorney General were to be notified of each such disciplinary infraction, his office would be overwhelmed with such notifications. Second, since disciplinary infractions do not involve a police investigation of any sort (and there is therefore no need for the Attorney General to reach any decisions regarding their investigation), it is possible in appropriate cases to forward the final audit report directly to the Civil Service Commission[50] or to other institutions responsible for discipline in the particular case, and to allow that body or bodies to determine whether or not to take disciplinary action against the officials mentioned in the report.

F. "…the Attorney General will inform the Comptroller and the Committee of the manner in which the matter was handled within six months of being notified."

As noted above, in 1996, Section 14(c) was amended to include, after its final words, the following language: "the Attorney General will inform the Comptroller and the Committee of the manner in which the matter was handled, within six months of being notified."[51]

The explanatory notes for the draft of the amendment stated that "[g]iven past experience, we propose that, at the end of six months from the time that the State Comptroller, in the

49 Explanatory notes to the draft of Amendment 40 - State Comptroller Bill Law (Amendment No. 40) 2007, HH [*Hazaot Hok* - Proposed Laws] 169, 273.

50 The Civil Service Commission's Investigative Unit undertakes the investigation and gathers the evidence for the sake of holding a disciplinary hearing of civil servants working in government ministries (as noted, some civil servants are not bound to the Civil Service Commission, such as local government employees who are bound by the Local Government Law (Discipline) 5738-1978, and the investigative unit gathering evidence in those cases is not the Civil Service Commission's Investigative Unit).

51 State Comptroller Law (Amendment No. 30) 1996, *supra* note 9.

course of an audit, becomes aware of a suspicion regarding the commission of a criminal act and notifies the Attorney General of such, the Attorney General will inform the Comptroller and the State Audit Committee[52] of what was revealed during the examination of the matter and will also indicate – if a decision was reached to act on the Comptroller's initiative – which steps were taken."[53] This was the full explanation provided, although there was no indication of what specific "past experience" had shown that there was a need to amend the law.[54] In any event, the obvious objective of the amendment was to make it possible to follow the handling of matters that were the subject of notifications submitted to the Attorney General, thus ensuring that the matters were examined and handled appropriately.

Thus, according to the statute's current language, the Attorney General is required to inform the Comptroller and the Committee, on only one occasion, of the manner in which the subject of the notification was handled; this must be done within six months of being notified. The drawback of requiring only a single report, to be provided within the six-month time-frame, is that, generally speaking, no final decision on matter is ever made within such a short period; the reports provided by the Attorney General therefore tend to be very laconic. An answer stating that "[t]he Attorney General has decided not to open a criminal investigation" allows the State Comptroller to renew work on an audit that was halted earlier because of the submission of a notification to the Attorney General, and can therefore be important despite its brevity.[55] But a laconic answer of a different sort, such as "[t]he Attorney General has decided to submit the matter to the police for further handling" creates a problem for the State Comptroller, because this step could lead to various

52 The State Audit Committee is one of the Knesset's standing committee; its mandate is to discuss the reports submitted by the State Comptroller and his exercise of his powers pursuant to the State Comptroller Law. The Committee reviews the conclusions presented in the Comptroller's reports and provides recommendations for their implementation. The Committee can also summon representatives and officials of relevant audited institutions to appear before it.

53 Explanatory notes to the draft amendment of the State Comptroller Law (Amendment No. 33) (report to committee) 1996, HH 2493, 505.

54 For the sake of comparison, the laws of several countries make no provisions regarding reporting mechanisms, and in these countries, the reporting process may be regulated by internal working procedures or through a completely different approach. In India, *supra* note 33, the law provides that every institution receiving the report will establish a mechanism for documenting the reports and reporting progress in handling the matter, though without noting any set schedules; in Poland, *supra* note 19, the reporting mechanism is established in the law itself, but it does not specify reporting times. However, in answer to the question posed to it, the Polish office answered that the director of the office has determined that regional audit bureaus and the general prosecuting bureaus will have "coordinating officers" appointed who will provide more effective functioning and better monitoring of the development of the proceeding; by contrast, Hungary has established that the body receiving notification will announce its position on opening an investigation proceeding within 60 days and will, within 30 days of completing its handling of the proceeding, announce the final outcome of that process.

55 By contrast, former State Comptroller Justice (ret.) Goldberg noted that, in his opinion, the Attorney General's report of the handling of a matter submitted to him is unimportant. See Justice Goldberg's handwritten memorandum to the then Legal Adviser, Nurit Israeli, dated August 11, 2003 (held in the Legal Department's archive).

outcomes. One possibility would be a police examination and then a conclusion that no crime had been committed and that the file could be closed; another possible outcome would be an investigation (or an examination that develops into an investigation) which leads to the file being closed; and a third possibility would be an investigation that leads to an indictment and a trial. If the State Comptroller's Office does not know how the police examination or investigation has been concluded, it cannot obtain any information that could help it make an informed decision about whether to begin its own examination (or to continue the audit), regarding the matter about which the Attorney General was notified.[56]

Because the Attorney General reports on the handling of the suspicion that was reported to him by the Comptroller only once, six months after the notification is sent, the State Comptroller's Office does not have data about the number of cases in which an indictment was issued following notification of the Attorney General by the State Comptroller's Office. For the same reason, the Office does not have information regarding the number of officials in audited institutions who were consequently found guilty in criminal or disciplinary courts, with respect to matters that were the subject of Section 14(c) notifications.

3. Providing Audit Materials to the Attorney General's Office, the Police, the Court, or the Defendant

A. Providing Materials to the Attorney General's Office and to the Police, Following Notification Pursuant to Section 14(c) of the State Comptroller Law

Section 14(c) provides that the State Comptroller shall **notify** the Attorney General of a suspicion regarding the commission of criminal acts. It does not state that the Comptroller must also **provide** the Attorney General with the specific materials that gave rise to the suspicion. Nonetheless, since the notification process is meant to help the investigating parties examine the matter and to assist them in examining the possibility of prosecuting those who were involved, it is only a matter of common sense that the notification to the Attorney General should also include the basic audit documents that gave rise to the suspicion regarding a criminal act.

56 This is based on the presumption that once the Section 14(c) was utilized, the Comptroller did not examine the issue at the outset or, alternatively, an examination was commenced but then stopped because the Attorney General was being notified.

The State audit process is based on the State Comptroller's authority to access all materials held by the audited institutions, that the State Comptroller's Office needs in order to carry out the audit. This authority is established in Section 3 of the Basic Law: the State Comptroller, which also establishes the duty of audited bodies to provide the auditors with any information needed for the audit, including sensitive and classified materials. [57] Moreover, in order to encourage cooperation between the employees of the audited institutions with the State Comptroller's Office, the legislature (in the State Comptroller Law) established that State Comptroller personnel are bound by rules of confidentiality regarding any and all information of which they become aware in the course of their work.[58] The law further provides that reports, opinions, and documents prepared by the Comptroller, as well as declarations made to the Comptroller in his role as the Comptroller, cannot be used as evidence in legal proceedings.[59]

The arrangements described above would seem to indicate that, as a rule, no use may be made of the information that reaches the State Comptroller's Office, other than as part of the preparation of the audit reports. The goal of these arrangements is to encourage the audited bodies' cooperation with the auditors, so that the auditors can receive all the information that is essential to their work, without those bodies worrying that the information will be used for other purposes. The provision of materials to the governmental investigating authorities pursuant to Section 14(c) should therefore be viewed as an exception to the prohibition on providing information that was received for the purpose of an audit, for non-audit purposes.[60] This exception would be justified, presumably, by the public interest in helping the enforcement and investigating authorities to prosecute those who commit crimes.

Thus, the State Comptroller's Office has, over the years, developed a practice of providing the basic documents that gave rise to the suspicion of a criminal act at the same time that the notification is delivered to the Attorney General. A delivery of documents requires the personal in-principle approval of the State Comptroller (who makes the decision after receiving a recommendation from the Legal Adviser of the existence of "a suspicion that a

57 Section 3 of Basic Law: The State Comptroller, provides as follows: "A body subject to State Audit will, upon request, immediately provide the State Comptroller with information, documents, explanations, or any other material which the Comptroller deems necessary for audit purposes."

58 Section 23 of the State Comptroller Law: "The staff of the Comptroller's Office and all other persons assisting the Comptroller in carrying out his function, must maintain the confidentiality of any and all information obtained by them in the course of their work, and shall give a written undertaking to such effect upon starting work."

59 See section 30 of the State Comptroller Law, discussed below.

60 It should be noted that, in certain cases and in order to cooperate with enforcement agencies, audit documents are forwarded to the Police even when the Police investigation is initiated through another route and not pursuant to a Section 14(c) notification. A discussion of this exception is beyond the scope of this essay.

criminal act has been committed"), and approval regarding the specific documents that are being delivered.[61] In the letter addressed to the Attorney General, the State Comptroller's Office will note that its personnel will be available to provide the State Attorney and the Police with details regarding the foundations of their suspicions, and to present other documents and findings supporting their suspicions.

If the matter is forwarded to the Police, and the Police then ask the State Comptroller's Office for additional materials (beyond those that have already been provided), the practice has been to include (in the letter summarizing the provision of the materials) a comment indicating that the documents provided to the Police may not be relied upon as evidence, and can only serve as background material.[62] This means, essentially, that the Comptroller's Office tells the Police that if the documents are needed as evidence, the Police will need to obtain the originals from the audited body. In this way, the auditors from the State Comptroller's Office will not be summoned to criminal court to testify, and will not be asked to reveal documents that they received specifically for the purpose of the audit. The reason for following this practice is to avoid damaging future cooperation between audited institutions and state auditors, as such cooperation is crucial to the state audit work.

This practice was based on an agreement reached by the then-State Attorney Dorit Beinish and the then-Legal Adviser Mordechai Bass,[63] and in reliance on Section 30 of the State Comptroller Law, which provides as follows:

> (a) No reports, opinions or other documents issued or prepared by the Comptroller in the discharge of his functions shall serve as evidence in any legal or disciplinary proceeding.

61 See Standing Order 54/2: "Audit After Discovery of Criminal Suspicion", p. 2, Section 5(b), dated April 13, 1954 (held in the Legal Department archive), formulated by the State Comptroller, which provides as follows: "Our office will assist the Police, both for public reasons and for audit reasons, to set an example […] The duty to maintain confidentiality, pursuant to Section 13(d) of the State Comptroller Law [currently Section 23 of the law] applies to the Police as well, and our personnel are prohibited from forwarding to the Police any information they obtain in the course of their work, except with the State Comptroller's explicit agreement (or that of the Director General or the Legal Adviser, when authorized to do so on behalf of the State Comptroller) […] It is inconceivable that severe damage could be done to our work because of consideration of the demands of the Police."

62 For the sake of comparison, the regulatory arrangement that used in India requires that the materials are delivered to enforcement agencies in a confidential manner, and that the use of the materials requires independent review of the material obtained from the audited institution: "The investigative agency should use information given by us as a lead and make their own examination of the primary/original records which are available with the audited entity/Department."

63 Letter dated December 22, 2003, from the Legal Adviser to the Attorney General, captioned "Application of Section 30(a) of the State Comptroller Law 1958 [Consolidated Version]" (letter held in the Legal Department's archive).

> (b) A statement received in the course of the discharge of the Comptroller's functions shall not serve as evidence in a legal or disciplinary proceeding [...].

Thus, according to Section 30(b), information submitted during the audit pursuant to the statutory obligation to cooperate with auditors, and which includes non-public information, cannot be used as evidence. This arrangement provides a counterweight to the disclosure obligation incumbent on the audited bodies' personnel pursuant to Section 3 of the Basic Law: State Comptroller; the arrangement thus protects materials that are delivered to the audit staff, by limiting their use to the purpose of carrying out the audit.

In 2008, the status of materials delivered by the State Comptroller's Office to the Attorney General and the police was modified, to a certain degree. In a letter dated March 11, 2008, Yehoshua Lemberger, the Deputy State Attorney for Criminal Matters, informed the State Comptroller's Legal Adviser that "intelligence material" provided by the State Comptroller's Office would henceforth have the status of "investigation material," in appropriate cases. Thus, if an indictment was later issued regarding the matter that was the subject of the State Comptroller's Section 14(c) notification, the discoverability of such material would depend on the court's review of its contents and relevance, pursuant to Section 74 of the Criminal Procedure Law. Lemberger added that despite the change, the classification of the material as "investigation material" would not make it automatically admissible in terms of the rules of evidence.[64]

The Legal Adviser at the time, Nurit Israeli, responded to this development in a letter to the State Comptroller and the Director General of the State Comptroller's Office, in which she pointed out that materials delivered to the Attorney General by the State Comptroller's office would henceforth be potentially discoverable, if a defendant requested to see them. She also pointed out that such materials would, nevertheless, continue to be inadmissible in court proceedings pursuant to Section 30 of the law and "the relevant laws of evidence". However, she also remarked that it had now become possible that such materials could play a part in judicial proceedings "having been made 'acceptable' through incorporation into witness statements and the like – methods that had been sanctioned in the case law."[65] Thus, although the status of these materials was changed, as described in Lemberger's 2008 letter, and such materials came to be included within the category of potentially discoverable "investigation materials," the State Comptroller Law has clearly established that the materials are generally inadmissible as evidence in a court proceeding. However, it

64 Letter from Deputy State Attorney (Criminal Matters) Yehoshua Lemberger dated March 11, 2008, to the Legal Adviser (letter held in the Legal Department's archive).

65 Letter from the Legal Adviser, dated March 19, 2008, to the State Comptroller (letter held in the Legal Department's archive). The Legal Adviser referred, in this regard, specifically to CA 2910/94 *Yeffet v State of Israel* [1996], IsrSC 50(2) 221.

continues to be the practice that State Comptroller's Office personnel do not serve as witnesses in criminal proceedings.

B. Providing Further Materials, at the Defendant's Request, Pursuant to Section 74 of the Criminal Procedure Law

Section 74 of the Criminal Procedure Law grants a defendant the right to receive a copy and to review all investigation material held by the prosecution office and relating to the indictment issued against the defendant'.[66] A recent Israeli case – originally heard in the Tel Aviv District Court – dealt with, *inter alia,* the question of whether Comptroller Office materials, which were not provided to the Israel Police, should be considered "investigation materials" as the phrase is used in Section 74 of the Criminal Procedure Law. The case involved a civil servant who was prosecuted pursuant to a criminal indictment, as a result of a notification given by the State Comptroller to the Attorney General in accordance with Section 14(c) of the State Comptroller Law. The indictment referred to the civil servant's alleged commission of a crime at the institution where he worked, and was based on the materials that had been delivered to the Attorney General and the Police. The defendant filed a motion in the District Court, based on Section 74 of the Criminal Procedure Law, in which he asked the court to instruct the State Comptroller's Office to provide him with the materials that had not been delivered to the Police via the Section 14(c) channel.[67]

The Police had given the defendant all the investigation materials in the file, including copies of all documents the State Comptroller's Office had handed over to the investigating agencies, but the defendant wanted access to additional material. He asked the court to recognize all the materials that had served the State Comptroller's Office in its preparation of the audit reports – even those that were not in the investigation file – as "investigation materials," as defined in Section 74 of the Criminal Procedure Law, and to instruct the State Comptroller's Office to provide him with those materials as well. He wanted to receive notes of conversations held between State Comptroller's Office personnel and individuals at the audited institution, which – according to the defendant – were exculpatory in nature and could assist him in his defense. The

66 Section 74 of the Criminal Procedure Law provides as follows: "Should an indictment regarding a crime or misdemeanor be issued, the defendant and his attorney as well as any person the attorney has authorized for such purpose, or, with the prosecutor's agreement, a person the defendant has authorized for such purpose, will be entitled at any reasonable time to inspect and copy the investigative materials and the list of all materials gathered or listed by the investigative authority relating to the prosecution's indictment."

67 CrimC (Tel Aviv) 66313-12-15, *Hevroni v. State of Israel* (Published in Nevo, December 15, 2016).

primary goal was apparently to establish the foundation for a defense based on selective enforcement, unreasonable delay, and abuse of process.[68]

The State Comptroller's Office opposed the defendant's request, and provided several reasons, of which the most relevant was the dangerous precedent that would be set if the court ordered the hand-over of all the requested materials, and the consequent weakening of the Comptroller's ability to inspire trust among the personnel of audited institutions.[69] The District Court rejected the defendant's motion, primarily on procedural grounds, but also in recognition of the State Comptroller having a substantive interest in the outcome of the motion. The District Court rejected the request and determined that, given the circumstances as a whole, the proper normative setting for a deliberation of the particular was not Section 74 but rather Section 108 of the Criminal Procedure Law, which allows the court to order a witness to submit documents in his/her possession[70]. In rejecting the motion, the District Court relied on – *inter alia* – two procedural aspects of the request for investigation materials based on Section 74. One was that the Section 74 procedure through which the defendant had requested the materials did not allow for an unmediated hearing of the Comptroller's concerns, whereas a Section 108 procedure would allow the Comptroller's arguments to be heard openly. A second procedural consideration relied upon by the District Court was that Section 108 motions are heard by the same judicial panel hearing the main criminal case, whereas Section 74 motions are not.

The defendant appealed the District Court's decision to the Supreme Court where it was heard by Justice Menachem Mazuz.[71] Before the Supreme Court, the State Comptroller's Office continued to argue that materials that had not been provided pursuant to Section 14(c) should not be made available as investigation material, and should be requested in accordance with the Criminal Procedure Law Section 108 procedure that allowed for the production of specified documents held by subpoenaed witnesses.[72] The Legal Adviser to the State Comptroller submitted a letter to the Court in the framework of the appeal, presenting a detailed explanation of the State Comptroller's position regarding the

68 There was no organized list of all the materials provided by the auditors to the investigative agencies, but it is clear that many documents gathered during the audit were not related to the investigation of the defendant; these were not given to the Police, and instead remained with the State Comptroller's Office.

69 The *Hevroni* case, *supra* note 67, Section 4 of the court's decision.

70 Section 108 of the Criminal Procedure Law provides as follows: "The court may, on the basis of a litigant's request or of its own initiative, order a witness under subpoena, or any other person, to provide the court with the documents in his/her possession and which are specified in the subpoena or court order at the time specified in the subpoena or court order."

71 CrimApp 56/17 *Hevroni v. State of Israel* (published in Nevo, January 24, 2017).

72 *Ibid*, Paragraph 10 (Justice Mazuz). The State Comptroller's Office argued that the appropriate procedure would have been to make a request based on Section 108 rather than Section 74. Even so, the Office claimed, that a proper exercise of judicial discretion would have led, in reliance on the appropriate balancing required for Section 108 claims, to a ruling that the materials should not have been delivered to the defendant.

production of materials held by the State Comptroller's Office in general, and regarding this case in particular.[73] He presented several grounds for opposition to the request for more information/material. First, he noted that the Comptroller's Office should not be required to hand over non-relevant material. Next, he argued that because of the necessary balancing of the defendant's interests and the interest of protecting the state audit process, no order should ever be issued requiring the production of the following types of materials, even if they contained possibly relevant information: notes revealing an intelligence source; notes of a conversation with an individual who had spoken on condition that his remarks remain confidential; and information provided by a complainant or whistle-blower who had requested confidentiality. Finally, he noted that the opinions of the investigating agencies or the Police, to the effect that the State Comptroller did hold relevant material, should not justify (by themselves) a requirement that any materials be handed over by the State Comptroller.

Justice Mazuz, writing for the Supreme Court, accepted the State Comptroller's position and held as follows: "I doubt that a procedure based on Section 74 is suitable for a situation in which the defendant asks for materials gathered in the course of an audit by the State Comptroller's Office, making the claim that these constitute 'investigation materials', unless the request is for the materials that have been submitted in accordance with Section 14(c) of the State Comptroller Law and which are in the hands of the police or the prosecution. I question the use of this procedure because of, *inter alia,* the prosecution's lack of knowledge about or lack of control over the materials held at the State Comptroller's Office, because the State Comptroller is not a part of the executive branch that is subordinate to the Attorney General's directives, and because of the limitation the State Comptroller has imposed on the submission of materials as noted."[74] Given the unique circumstances and the State Comptroller's position as explained above, it was decided to reject the appeal and to allow the appellant to start a procedure to request the materials based on Section 108 of the Criminal Procedure Law.

C. Request for Further Materials in Accordance with Section 108 of the Criminal Procedure Law

After the rejection of the Section 74 motion the same defendant went on to bring a motion based on Section 108 of the same Criminal Procedure Law, seeking further materials from

73 This document, presenting the State Comptroller's position, was submitted to the court; although the fact of its submission was acknowledged in the opinion, its text was not quoted. The document was nevertheless included in the court file and a copy remains in the Legal Department's archive.

74 *Hevroni* case, *supra* note 71, para. 11, per Justice Mazuz.

the State Comptroller's Office.[75] In the request, the court was asked to instruct the State Comptroller's Office to make available, for the defendant's perusal, all examination materials in its possession that had been used in the preparation of the State Comptroller's report.

The State Comptroller's Office opposed this request as well, arguing that a balancing of interests was needed, and that the request for all the materials did not indicate that any effort to weigh opposing concerns had been carried out. The balancing, the State Comptroller pointed out, was of vital importance, given the Comptroller's need to ensure cooperation from audited institutions, in order to be able to do his audit work properly. The State Comptroller's Office should not, it was argued, serve as a conduit for providing the materials it received from audited institutions for the purpose of their audit.[76]

The District Court essentially accepted the State Comptroller's position regarding this motion. After pointing out the interests that needed to be balanced – the State Comptroller's constitutional status and the importance of its ability to conduct audits, on the one hand; and the defendant's interest in receiving the requested materials and their relevance to his case, on the other hand – the Court (Judge Margolin Yehidi) found that there were no materials that had not already been handed over to the investigating authorities that were of relevance to the issues involved in the case, such that delivery to the defendant was justified. Judge Margolin Yehidi noted specifically that the relevance of the material was limited, in light of the fact that no material provided by the State Comptroller's Office would be admissible as evidence in a criminal prosecution, given the statutory limitations prescribed in the State Comptroller Law.[77]

Given the limited relevance of the materials that the defendant had requested, and after balancing this with the State Comptroller Office's protected interests noted above, the judge ruled as follows:

75 The materials requested in this motion were those not originally submitted to the Police pursuant to Section 14(c).

76 A response was submitted to the court file and a copy is held in the Legal Department's archive. See AAA 8282/02 *Haaretz Newspaper Publishing Co. v State Comptroller's Office*, IsrSC 58(1) 465, 476-477 (2003): "The State Comptroller's refusal to fulfill the petitioners' request is not the end of the matter, because the information the State Comptroller possesses comes from the audited institutions. Why should the petitioners therefore not contact those institutions holding the information directly and ask them for whatever it is that they are seeking from the State Comptroller? It is the petitioners' right to draw water directly from the spring and contact those institutions and ask them for the materials they seek from the State Comptroller. Why do they insist instead on drinking water from the pipe that brings the water from the source?" See also, at p. 477 of the opinion: "It would be odd and unnatural were we to interpret the law as obligating the State Comptroller's Office to provide a third party with material it received itself pursuant to the obligation the law imposes on the audited institutions. Indeed, the Comptroller received information from the audited institutions for the sake of the audit alone; and from this arises the obligation imposed on State Comptroller's Office personnel (per the provisions of Section 23 of the State Comptroller Law) to keep in strictest confidence any information they obtain in the course of their work and to give a written undertaking to such effect upon starting work."

77 CrimC 66313-12-15 *State of Israel v. Hevroni* (as yet unpublished, February 21, 2017).

1. Regarding the raw materials submitted by the audited institutions, it was necessary to contact the individuals who submitted them rather than request them from the State Comptroller.

2. As for notes of conversations between State Comptroller Office personnel and individuals within the audited body, Judge Yehidi wrote that she was not convinced of the basis for the claim that these notes referred to the issues relevant to the criminal accusation. To the contrary, she had learned that all notes relating to the specific affair in question had actually been delivered to the defendant for his review; the remaining notes (those that had not been handed over) did not fall within the scope of materials covered by the proceeding.

3. "Finally, balancing the relationship and the connection claimed for the requested materials, the level of which is limited, touching as it does at most on broader circles rather than on the core of issues in dispute, on the one hand, and the force of the protected interest in the context of gathering materials by the State Comptroller Office, on the other hand […] I have concluded that it would be inappropriate to instruct the State Comptroller's Office to make additional materials available in the context of the request before me."

In summary, the Israeli statutes and case law indicate that materials held by the State Comptroller's office but not submitted to the investigating agencies are not included within the range of materials that must be provided to a defendant pursuant to Section 74 of the Criminal Procedure Law. As for requests based on Section 108 of the Criminal Procedure Law, it seems that documents may be produced only if it is proven that, given the circumstances of the case, they are relevant to the defense,[78] and that the defendant's interest in receiving the materials outweighs the interest in protecting the state audit process. In other words, while Section 108 gives the court authority to override the obligation imposed on State Comptroller's Office personnel to maintain the confidentiality of materials provided to them in the course of their audit work, the section does not override the rule established by the legislature, in Section 30 of the State Comptroller Law, that such materials will not be admissible as evidence in court.

Thus, these decisions (the District Court and Supreme Court decisions regarding the Section 74 motion, and the District Court's decision regarding the Section 108 motion) provide a good example of the ways in which the courts have determined a proper balancing between the public interest inherent in protecting materials held by the State Comptroller's Office – on the one hand - and the personal (and public) interest in guaranteeing a defendant access to

78 Taking into consideration the fact that any such documents would be inadmissible as evidence.

materials relevant to his defense, on the other hand. Proper consideration of the public interest of the functioning of the Israel's supreme auditing institution is indeed important.

Conclusion

The Basic Law: The State Comptroller, authorizes Israel's State Comptroller to examine the legality of acts of an audited body – as well as its integrity, good governance, effectiveness, and efficiency, and any other aspect that the State Comptroller sees fit to examine. Section 14(c) of the State Comptroller Law provides that when audit findings raise a suspicion regarding the possible commission of a criminal act, the State Comptroller must notify the Attorney General and thus give him the opportunity to examine the possibility of prosecuting the relevant position holder in the audited institution. Similar mechanisms may be found in the legal systems of other countries, which prescribe various procedures to be followed when the supreme audit institution uncovers facts indicating a possibility that criminal acts have been committed; in many countries, the SAI is required to forward the matter to agencies charged with prosecuting crimes, or to facilitate investigation and possible prosecution in some other way. In some countries, the SAI itself exists in the form of an auditing tribunal and has its own independent authority to prosecute various defendants for specified crimes or types of crimes.

The International Organization of Supreme Audit Institutions (INTOSAI) has taken the position that SAIs must be aware that the main function of a supreme audit institution is to critique and examine the functioning of government institutions. According to INTOSAI's published position on the matter, a supreme audit institution is not a substitute for law enforcement or prosecution agencies. Thus, even if a particular SAI is granted considerable latitude with respect to the handling of suspected criminal activity, it should use its authority only to help those institutions that are actually charged with prosecuting or investigating crimes.[79]

In this essay, we have analyzed various issues regarding the interpretation and implementation of section 14(c), as well as legal disputes that have arisen relating to some of the consequences of the section's application."

We have attempted to set out the proper balance between the public's interest in enabling the State Comptroller's Office to issue audit reports that present its findings, on the one hand, and – on the other hand – the interest of investigating and prosecuting enforcement

79 The International Organization of Supreme Audit Institutions, *INTOSAI: 50 Years (1953-2003)* 147 (2004).

agencies in being able to conduct investigations without obstructions and interference, and in ensuring that those who commit crimes face the appropriate legal consequences. We hope that the insights presented in this essay will enhance the crucial cooperation between the State Comptroller's Office and the enforcement authorities, so as to ensure good and proper governance.

The Birth of the Modern Ombudsman Concept

Isaac Becker*

Introduction

The idea of an Ombudsman institution for the State of Israel had a relatively long gestation period. As early as 1966, the Knesset appointed a Parliamentary Committee to examine the possibility of establishing such an institution in Israel.[1] However, the "long, exhausting journey" – to quote the words of former MK Yosef Tamir – which eventually ended with the establishment of the Ombudsman's office, had actually begun years before. Along the way, those promoting the idea had encountered extensive resistance from many parties opposed to the importation of the ombudsman concept – a concept that was rooted in very distant lands and cultures.[2]

At the end of this protracted process, Israel's Ombudsman came into the world on the eve of Passover in April 1971, when the Fifth Amendment to the State Comptroller Law of 5718-1958 was passed.[3] As part of this amendment, a seventh chapter was added to the State Comptroller Law and a new function was given to the State Comptroller in addition to state audit: the investigation of public complaints about institutions and office-holders specified in

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1 Eliezer Goldberg, "Israel's Ombudsman: Principles and Their Application" (Hebrew), *Studies in State Audit*, Vol. 59, 9 (2002).

2 Regarding MK Tamir's efforts to promote the issue and the difficulties he faced, see Yosef Tamir, "Despite All the Obstacles: Building Blocks in Establishing the Office of the Ombudsman" (Hebrew), *Studies in State Audit*, Vol. 59, 27 (2002).

3 State Comptroller Law (Amendment No. 5) 5731-1971, 63, 623, 112.

the law. This investigation work would be carried out by the State Comptroller, under his new designation – "The State Comptroller and Ombudsman of Israel".[4]

But, when was the notion of the modern ombudsman itself born? To answer this, it is necessary to trace the development of the institution of ombudsmen around the world, from its birth, through the time of its successful integration within the governmental systems of various countries, and the consequent improvement to the lives of countless human beings where the institution came to be a norm.

1. Birth of the Ombudsman Concept

The root of the word "ombudsman" is very old. Among the ancient Germanic tribes, the term "ombudsman" was applied to the person who would collect the "*Wergild*" – a compensation payment for the death of a human being at the hands of another – from the killer's family, a system developed to prevent an ongoing cycle of revenge killings. The prevalent theory is that the word is composed of "om" – meaning "regarding" or "about" – with the addition of "bud," meaning "penalty"; hence, the "ombudsman" is "the person in charge of the penalty".[5] Over time, in Scandinavia, the concept began to be applied to representatives of various kinds. In Sweden, for example, this concept had many different meanings, such as "agent", "executor", and "representative".[6]

In 1809, the term "ombudsman" – the full title was "Justitieombudsman" – was given to an institution established by the new Swedish constitution. The Parliament sought, through this official, to protect the Swedish people from government institutions, i.e. the King's officials and the judges he appointed, and to ensure that these parties conducted themselves appropriately and in accordance with the constitution. The general understanding is that this was when the modern concept of an ombudsman institution was born. See, for example, the following remark in an essay entitled "The Ombudsman: A Gift from Scandinavia to the World":

4 Section 4 of the Basic Law: State Comptroller of 1988 conferred upon the institution of the ombudsman its constitutional status.

5 Stanley Anderson, *Origins of the Ombudsman*, in OMBUDSMAN PAPER AMERICAN EXPERIENCE AND PROPOSALS (1969), in the compendium: State Comptroller, *Ombudsman* (source book) 7 (1971).

6 IBRAHIM AL-WAHAB, THE SWEDISH INSTITUTION OF OMBUDSMAN 19 (1979).

> "As is well known, the Ombudsman institution originated in Sweden at the turn of the 19th century…"[7]

However, the ombudsman institution that was established in the Swedish constitution in 1809 was actually not the first entity to fulfill such a function, neither in the world nor in Sweden itself. In fact, the appointment of the Ombudsman in 1809 by the Swedish Parliament did not create **a new institution** to protect the interests of the citizens, but was a **parallel institution** to **a position that already existed,** but the position had previously been held by a person appointed directly by the King himself.[8] That royal representative, then called "Justitiekanslerri",[9] was – at the beginning of the institution's existence – also called "Ombudsman",[10] after being appointed by the exiled Karl XII to maintain order and investigate complaints submitted by the Swedish kingdom's subjects during the King's absence.

In the early eighteenth century, a situation of never-ending war prevailed between the Swedish kingdom and Tsarist Russia. This tension formed the background to the exile of Karl XII. In 1700, as a new - and very young - king (he was only 18 at the time), Karl won a surprising military victory against the Tsar. But, nine years later, the Tsar had his revenge when he defeated Karl in a battle that took place in the Ukraine. King Karl was subsequently exiled from his kingdom for an extensive period of time.[11] From the middle of 1709 until February 1713, Karl XII stayed near the city of Bender in Moldova under the protection of the Ottomans. At some point, he began to examine the possibility of appointing a representative to safeguard his kingdom in his absence. This idea assumed concrete form in October 1713, after the King moved to the palace in Demotika (located in modern-day Turkey), when he signed an order providing for the appointment of a "Supreme Ombudsman".[12]

Thus, on some level, the institution of an ombudsman actually first came into being almost 100 years earlier than the commonly accepted date – i.e., during the early 1700's rather than the early 1800's. And, if this is true, what is the birthplace of the ombudsman institution? In the ancient city of Demotika, Turkey, where the institution took concrete

7 Niels Holm, *The Ombudsman - A Gift from Scandinavia to the World*, in THE DANISH OMBUDSMAN 223, 223-232 (2005).

8 DONALD C. ROWAT, THE OMBUDSMAN PLAN: THE WORLDWIDE SPREAD OF AN IDEA 3 (1985).

9 Literally "chancellor of justice."

10 In actuality, the title was *Högste Ombudsmannen* or Supreme Ombudsman. However, the name was changed to Justitiekanslerri as early as 1719: CHRISTIAN GIORDAN, FRANCOIS RUEGG & ANDREA BOSCOBOINIK, DOES EAST GO WEST? ANTHROPOLOGICAL PATHWAYS THROUGH POSTSOCIALISM 9 (2014).

11 Frank Orton, *The Birth of the Ombudsman*, in THE DANISH OMBUDSMAN 247, 247-249 (2005).

12 *Ibid.*, pp. 247-248.

shape? Or can Moldova be deemed to be its birthplace, as Karl XII was living there when the idea first germinated?

It can also be said that the institution created by Karl XII was not, in actuality, itself a new development. According to this view, the exiled king was inspired by the Islamic functionary known as the *kadi al-kudat*[13] – the *diwan al-matalam* in its Ottoman iteration – a concept to which he was exposed during his exile in the Ottoman Empire. The meaning of the title *diwan al-matalam* is "the one who registers complaints". This body operated separately from the Empire's courts, and was meant to serve as an address where subjects could submit complaints about persons of authority within society.[14] If this is indeed the origin of the concept of a public ombudsman, it can be said to have Islamic roots going back even farther than the Swedish king's first appointment of a protective representative.

Regarding this point, it should be noted that these Islamic functionaries were appointed by the "executive branch of government" as it were – the King or the Caliph. Therefore, although it was a rather advanced institution relative to that period of time, it was not always clear how such a representative was to act when the interests of the imperial subjects stood in significant conflict with those of the officeholders within the "executive branch" itself. The members of the Swedish Parliament were similarly doubtful of the trustworthiness of the King's representative in terms of representing the subjects' interests; therefore, at the earliest opportunity, the legislature established the official ombudsman institution, as a parliamentary body whose function was, first and foremost, to represent the citizens of the state.

2. Birth of the Parliamentary Ombudsman

The Justitieombudsman enshrined in the Swedish constitution in the early 19th century was thus the first parliamentary ombudsman in the world, at least in modern history.[15] However,

13 Al-Wahab, *supra* note 6, at p. 24.

14 His authority was not limited to handling complaints against official government entities. It was also possible to lodge complaints against the rich and powerful: Essam Abu Al-Addas, *Historical Outline of the Ombudsman from the Islamic Perspective*, in THE DANISH OMBUDSMAN 239, 241-246 (2005).

15 A parliamentary ombudsman refers to an ombudsman accountable to the parliament – rather than the king or some other type of executive branch. While the Swedish Parliament assumed authority for appointing the Justitiekanslern already in 1766-1772, the position – officially and essentially – remained that of a representative of the royal household and executive branch of government. The constitution of 1809 was the first opportunity the Parliament had to create a separate institution that would serve as the Parliament's official representative with respect to the issue. For more, see LINDA REIF, THE OMBUDSMAN, GOOD GOVERNANCE AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM 5 (2004).

two historical facts raise doubts as to whether one should think of the Swedish ombudsman institution as the direct progenitor of the modern institution.

The first historical fact is that the institution that developed in Sweden does not seem to have inspired similar institutions elsewhere in the world. It was only 110 years after the first Swedish ombudsman legislation was enacted that a single other nation – Finland – adopted the concept, and that happened only after Finland was liberated from Russian control at the end of World War I.[16] And even then, after two ombudsmen institutions had been established in Europe, and it might have been expected that other countries would create similar institutions, this did not happen. No other country was ready to recognize an official with a similar function at that time.

The second historical fact is that the model of the parliamentary ombudsman eventually adopted (during the 1960's and later) in most of the countries where such an institution exists, was not the Swedish model. As clarified above, the Swedish Legislative Ombudsman was based on the model articulated by the exiled King Karl XII, who in 1713 appointed an ombudsman to oversee the conduct of various entities in his kingdom, including the courts. As a result of its historical background, the Swedish parliamentary ombudsman was thus also granted, by the constitution, the authority to oversee and investigate complaints regarding the State's judicial tribunals. By contrast, the model adopted by most nations in the second half of the 20th century was an ombudsman who handles complaints concerning the executive branch of government, but not the judicial branch. Furthermore, the Swedish ombudsman established in the early 1800's functioned more as a prosecutor than as an investigator of citizens' complaints tasked with making recommendations as to how to resolve them.

These two factors – the timing of the spread of the concept, and the ombudsman model that most countries eventually adopted – suggest that Sweden was not actually the direct source of the ombudsman revolution. A look at the increase of ombudsman institutions around the world in the 1960's – called "ombudsmania"[17] by some – and the authority given to those institutions shows that the more direct source of this model was one of Sweden's neighbors: Denmark. It appears that the model of the parliamentary ombudsman created in Denmark, with jurisdiction to investigate complaints but without the authority to critique the

16 T. Modeen, *The Finnish Ombudsman: The First Case of Foreign Reception of the Swedish Justitieombudsman Office*, 1 OMBUDSMAN JOUR. 41 (1981).

17 A term attributed to Professor Donald Rowat of Canada, to describe the sudden enthusiasm over the institution and its global adoption: Charles Ascher, *The Grievance Man or Ombudsmania?* 27 PUB. ADMINISTRATION REV. 174 (1967).

courts, was the format adopted by many countries after its initial appearance in Denmark in the mid-1950.[18]

It may therefore be that Copenhagen, Denmark's capital, was where the clarion call for the Ombudsman revolution sounded for the rest of the world. It was this Danish effort that began a revolution which, within a relatively short period of time, swept through many countries throughout the world.[19]

3. Birth of the Modern Ombudsman

Like many projects, the creation of the parliamentary ombudsman institution in Denmark needed not just a good idea, but also a good "project manager". In this case, the man for the job was Professor Stephan Moritz Hurwitz. It is no coincidence that the concept of a public ombudsman became internationally popular only after Professor Hurwitz, a Jewish jurist and criminologist, was appointed Denmark's first ombudsman, a position he held from 1955 until his retirement in 1971. Professor Hurwitz worked tirelessly to introduce the concept of an ombudsman throughout the world; he spoke with politicians, academics, and officeholders in many countries about the institution's unique advantages and its importance in the modern state. He published numerous essays on the topic in international journals in various languages, and lectured on the ombudsman project all over the world. Professor Hurwitz made special efforts to entrench the concept of a vital ombudsman institution within the English-speaking world, by publishing brochures and other materials in English, and by making many television appearances in the countries he wanted to influence. His appearance on British television, for example, was so persuasive that British citizens began sending their complaints about British bureaucracy to Professor Hurwitz's office in faraway Copenhagen.[20]

The first country to adopt the ombudsman concept after Denmark was New Zealand.[21] As emphasized in a book about the institution's history in New Zealand, the person who had

18 The function was enshrined in the nation's constitution in 1953, but staffed for the first time in 1955. See Reif, *supra* note 15, at p. 6.

19 As the American scholar Leon Hurwitz notes: "It originated in Sweden in 1809, but it was not until Denmark established its ombudsman in 1955 that awareness of and interest in the institution spread beyond Scandinavia." See LEON HURWITZ, THE STATE AS DEFENDANT 82 (1981).

20 Rowat, *supra* note 8, at p. 132.

21 See John Robertson, *The Danish Ombudsman: New Zealand's Precedent*, in THE DANISH OMBUDSMAN 33 (1995). It should be noted that the same year (1962), Norway established its ombudsman institution, immediately after New Zealand.

the greatest impact on importing the institution to that distant country was none other than Professor Hurwitz:

The foremost international actor in the transfer of the ombudsman to New Zealand was Denmark's Ombudsman, Stephan Hurwitz. Between 1956 and 1961, Hurwitz disseminated at least nine articles about his office through internationally circulated English-language publications and several New Zealand individuals who later became advocates learned of the ombudsman through them.[22]

According to John Robertson, a former New Zealand Ombudsman, the event leading to the establishment of the institution was a UN-organized seminar in Sri Lanka (Ceylon, at that time) at which a paper by Professor Hurwitz about the importance of the ombudsman institution was read aloud before the participants, who included New Zealand's Justice Minister and senior Justice Ministry personnel.[23] Some of the seminar participants would later take up the reins and use their influence to promote the establishment of a similar institution in New Zealand.

The idea of establishing the Israeli version of the public ombudsman institution (titled, in Hebrew, "*Netzivut T'lunot Hatzibur*" or "Commissioner of Public Complaints") was also the result of Professor Hurwitz' efforts. According to former MK Yosef Tamir, Israel's path toward the adoption of the ombudsman concept started in 1959, when Tamir's political party sent him to Copenhagen - where he eventually met the Danish Ombudsman.[24]

Professor Hurwitz, who would later be called a "zealous proselytizer"[25] of the idea, played a key role not only in the later export of the Danish ombudsman model, but also in the original importation of the idea into Denmark itself. During the public debate conducted in Denmark after World War II, Professor Hurwitz addressed the question of how to protect civil rights against the country's growing bureaucracy, and suggested that instead of establishing administrative courts, it would be worthwhile to consider the establishment of an ombudsman institution. The public committee formed by Parliament to examine the issue eventually chose to accept Professor Hurwitz's learned opinion.[26]

22 LARRY HILL, THE MODEL OMBUDSMAN: INSTITUTIONALIZING NEW ZEALAND'S DEMOCRATIC EXPERIENCE, 67-68 (1976).

23 Robertson, *supra* note 21, at pp. 34-35.

24 Tamir, *supra* note 2, at p. 27.

25 ROY GREGORY AND PETER HUTCHESSON, THE PARLIAMENTARY OMBUDSMAN 63 (1975) .

26 Leon Boim, *The Ombudsman Institution* (Hebrew), 36 (1965).

Prof Stephan Hurwitz, 1901-1981

Professor Hurwitz had apparently come to be familiar with Swedish government institutions, such as the ombudsman, when he was forced to live in Sweden for a long period during World War II. Because he was Jewish, and because of his standing as a jurist, there was a very real concern that he would be personally harmed in the event of a Nazi occupation of Denmark; he was therefore smuggled into Sweden even *before* the other Danish Jews were transported by sea to Sweden in October 1943, after the nature of the Nazis' "final solution" became well-known.[27] Consequently, Professor Hurwitz also eventually played an important role in encouraging the Swedish authorities to officially express their willingness to accept the Jews of Denmark in their country – an announcement that heartened both the people smugglers and the people they were smuggling into Sweden.[28]

During Professor Hurwitz's extended stay in Sweden, he worked with Swedish officials on behalf of Danish refugees, both Jewish and non-Jewish. On October 20, 1943, he was called to meet Denmark's highest-ranking diplomat in Sweden, who suggested that he head a Refugee Bureau that would be established as a division within Denmark's official diplomatic mission in Sweden. His appointment to the Bureau was finalized quickly, by October 29th.[29] Thus, Professor Hurwitz and his staff – because of the large number of Jewish employees in the office, the division became known as "the Jewish office" – were required to handle the many different problems of the refugees in Sweden, such as employment, schooling for

27 Although the significant steps taken to save the Jews of Denmark attested to the generosity of spirit of many Danish citizens, anti-Semitism was not an unknown phenomenon in the streets of Denmark. In fact, some of the non-Jewish refugees in Sweden organized several anti-Semitic incidents, including some aimed at Professor Hurwitz personally. For this and for Professor Hurwitz's efforts to confront the phenomenon, see: SOFIE LENE BAK, NOTHING TO SPEAK OF: WARTIME EXPERIENCES OF THE DANISH JEWS 1943-1945, 218 (2011).

28 Leni Yahil, *Saving the Jews of Denmark: A Democracy Passes a Test* (Hebrew), 172, 229 (1967).

29 *Ibid* pp. 249-250.

university students and schoolchildren, caring for the ill and the aged, and even the founding of a type of police force that operated clandestinely against the Nazis.[30]

Years later, Professor Hurwitz came to handle similar problems as Denmark's first Ombudsman, after his native country eventually came to accept his suggestion regarding the adoption of the model used in Sweden – the country where he found refuge from the Nazi terror.

Conclusion

Today, ombudsman institutions exist in many countries around the world. In each of these, the ombudsman concept was "reborn" and adapted to the needs of the specific country and its prevailing culture of governance. Thus, the Israeli ombudsman concept was born in Jerusalem when the Knesset decided in 1971 to give the State Comptroller an additional function, and to have him serve as a public ombudsman as well.

An in-depth historical analysis of the development of the public ombudsman institution indicates that the idea germinated hundreds of years ago when the Swedish king, in a royal decree issued from his place of exile in modern-day Turkey, appointed his *Högste Ombudsmannen*. The actual historical origin of the institution may predate even that decree. The idea of the parliamentary ombudsman, whose function is to deal with citizens' problems with government representatives, and who works for the same body in which they are represented as citizens, was a later iteration that was originally born in Stockholm with the adoption of the new Swedish constitution of 1809. Finally, the model of the modern ombudsman was born in Denmark in 1952, and may, in some ways, have begun its maturation process earlier - within the Refugee Bureau in Sweden, headed by a Jewish jurist from Denmark who was charged with dealing with the problems of a particularly destitute people during the darkest hour of human history.

30 *Ibid*, pp. 250-251.