

The Effects of the Shortage of Judges in Israel

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Abstract

In Israel the shortage of judges that has worsened over the years has led to a serious deterioration in the operation of Israel's judicial system. The article is ascertaining the intensity of the shortage by using international comparisons and comparing the rate of growth in the number of judges with the rate of growth of the general population. The article further describes the three main areas affected by the shortage. The first area is the judicial system itself where the shortage is the primary determinant of the delay and what the public often perceives as procrastination plaguing Israeli courts. Second area affected is due process- the shortage has led, in tandem with other factors, to inefficiency in the judicial system, compelling it, most prominently in the last decade or so, to be *innovative*, that is, introduce procedures devoid of any legal footing. Third area affected are judges themselves.

Key words

Judiciary in Israel; Number of judges; Due Process; Settlement Judging

Resumen

En Israel, la escasez de jueces, que se ha agravado con los años, ha provocado un grave deterioro de la operatividad del sistema judicial israelí. Este artículo corrobora la intensidad de esa escasez utilizando comparaciones internacionales y estableciendo un parangón entre el ritmo en el aumento del número de jueces y el ritmo del crecimiento de la población. Además, el artículo describe las tres áreas principales afectadas por la escasez. La primera es el propio sistema judicial, ya que la escasez es el determinante principal del retraso judicial y de lo que el público a menudo percibe como la procrastinación que invade los juzgados israelíes. La segunda área es el proceso legal debido –la escasez, junto con otros factores, ha provocado la ineficiencia del sistema judicial, empujándolo, sobre todo en la última década, a ser cada vez más *innovador*, esto es, a introducir procedimientos carentes de base jurídica alguna. La tercera área afectada son los propios jueces.

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Palabras clave

Poder judicial de Israel; número de jueces; proceso legal debido; juicios de conciliación

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1. Introduction

Israel's judiciary is comprised of two groups of courts: the general law courts (also known as *regular courts*) and tribunals and other bodies vested with adjudicative authority. The difference between the two groups lies in the scope of their jurisdiction. Whereas the regular courts enjoy general and residual powers/jurisdiction, the judicial authority enjoyed by tribunals is limited in terms of the issues involved and the persons affected. Another difference, relevant to our discussion, is that only professional judges adjudicate in the regular courts. At the tribunals, we can often find non-professional judges; for example, in the religious courts, each affiliated with a religious group (Jews, Muslims, etc.), where the judges are religious leaders and are not required to have any legal education or experience.

The shortage of judges that has worsened over the years in three regular courts as well as the labor court has led to a serious deterioration in the operation of Israel's judicial system. Among the methods available for ascertaining the intensity of the shortage is international comparisons, with one report showing Israel to have the lowest ratio of judges per capita of the population in the countries surveyed. Another approach involves comparing the rate of growth in the number of judges with the rate of growth of the general population. Such a comparison, conducted by the author, reveals that the shortage started from the early days of the state so that even though added judges coped with the population growth and even exceeded it, the shortage remained.

This article describes the three main areas affected by the shortage in question. The first area is the judicial system itself, which suffers from chronic delays in the handling of cases. Irrespective of the given state of delay, we found that the shortage in judges is the primary determinant of the delay and what the public often perceives as procrastination plaguing Israeli courts. Additional factors also cause delay: first, the judicialization that has come to characterize Israeli society, where disputes quickly find their way to the courts; second, the dramatic rise in the absolute number of practicing lawyers; and third, the inefficient management of court activities. Regarding the last factor, we should note that administrative skills appear to play no part in the appointment of court presidents, with candidates suffering from a lack of training and insufficient, if any, managerial experience. As a result, court presidents find it difficult to optimize management of caseloads as well as direct judges over whom they exercise their authority.

Also affected by the shortage of judges is due process, one of the fundamental principles governing Israel's judicial system. The shortage has led, in tandem with other factors listed above, to inefficiency in the judicial system, compelling it, most prominently in the last decade or so, to be *innovative*, that is, introduce procedures devoid of any legal footing. Propelling these moves is the desire to accelerate consideration of cases, and shorten the time required to decide individual claims. The outcome of these innovations is damage to litigants' right to due process.

Thirdly, the shortage of judges has had an influence on the judges themselves. The intensifying pressure at work has convinced some judges to opt for early retirement. An extreme illustration of the severity of the rampant caseload-related pressure is the suicide of a judge who found himself incapable of reviewing his assigned cases according to schedule.

Still another area that may be influenced by the shortage of judges, I argue, is the declining public trust in the judicial system. This long-term and consistent trend is shown in various polls over the years (Rattner 2009). Yet, no definitive, empirical data has yet found evidence linking this decline, entirely or in part, to the shortage of judges and the growing delays marking litigation. Hence, it will not be discussed in this article.

In the next chapter, chapter two, I provide an overview of Israel's court system and the distribution of judges by court instance. The third chapter illustrates the shortage

of judges by means of data and graphs. The fourth chapter reviews the impact of this shortage on the legal system in general, and the fifth chapter describes its influence on due process. The sixth chapter turns to the effect of the shortage on the judges themselves.

2. The Structure and Jurisdiction of Israel's Courts

We begin with the Magistrates' Courts that, as courts of first instance, hear those civil and criminal cases lying within their jurisdiction while also acting as appellate courts with respect to the execution of registrar's decisions. This tier also encompasses a series of specialized courts presided over by Magistrates' Court judges: the Traffic Court, local courts, Small Claims Court, Juvenile Court and Family Court. At the time of writing, 436 judges, who represent 61% of all presiding judges in Israel, preside in these courts (Israel Central Bureau of Statistics 2017). The courts of second instance within the regular system are known as District Courts, which can also act as courts of first instance.

Courts of second instance within the regular system, the District Courts, serve as courts of first instance in cases of serious crimes and civil cases involving claims exceeding NIS 2.5 million (about \$650,000) in addition to other types of cases as determined by law. District Courts also act as appellate courts with respect to criminal and civil verdicts reached by Magistrates' Courts as well as appeals regarding judicial decisions reached by administrative courts and other bodies. District Courts also act as administrative courts mandated to hear, among other things, petitions submitted by individuals against government bodies, administrative appeals concerning decisions made and administrative actions taken by other official bodies. On this tier, we find 197 judges, representing 28% of all the judges active in Israel (Israel Central Bureau of Statistics 2017).

On the third and highest tier, the Supreme Court acts in a dual capacity: as an appellate court in civil and criminal cases initially decided by the District Courts and as the High Court of Justice. Turning to the Supreme Court on appeal in cases initially heard in the District Courts is considered a right whereas in other cases, the Court must agree to hear the appeal. In its capacity as the High Court of Justice (HCJ), the Supreme Court hears petitions against other branches of the government; within this context, the HCJ represents the first and last instance for the respective cases. The HCJ thus has the right of judicial review over all branches of government and has the power to grant relief in the interests of justice with respect to "matters in which it considers it necessary and which are not within the jurisdiction of any other court or tribunal" (Basic Law: The Adjudication 1984). Supreme Court judgments are binding on all lower tiers and on all residents due to its position within the legal hierarchy (Legal Foundations Law 1984). Serving on the Supreme Court are 15 judges, representing 2% of presiding judges in Israel (Israel Central Bureau of Statistics 2017).

Outside the structure of the regular court system, we find the Labor Courts, which have the specialized authority to adjudicate cases in the area of labor law and social insurance as well as administer a long list of laws over which they have exclusive authority, such as claims made in compliance with the Prevention of Sexual Harassment Law (1998). About 65 judges, representing 9% of all judges, sit in the Labor Courts. Hearing each case are a judge and two representatives of the public, with the first representing employers and the second employees. Only in Labor Courts are there lay judges. This segment of the system is also organized hierarchically, in two tiers, with the first instance comprised of five District Labor Courts and the second instance the National Labor Court, which acts as an appellate court with respect to the judgments handed down by the District Labor Courts and as a first instance with respect to labor disputes. Decisions reached by the National Labor Court can be appealed only to the HCJ, which tends not to intervene other than in those rare cases where a purely legal error has occurred.

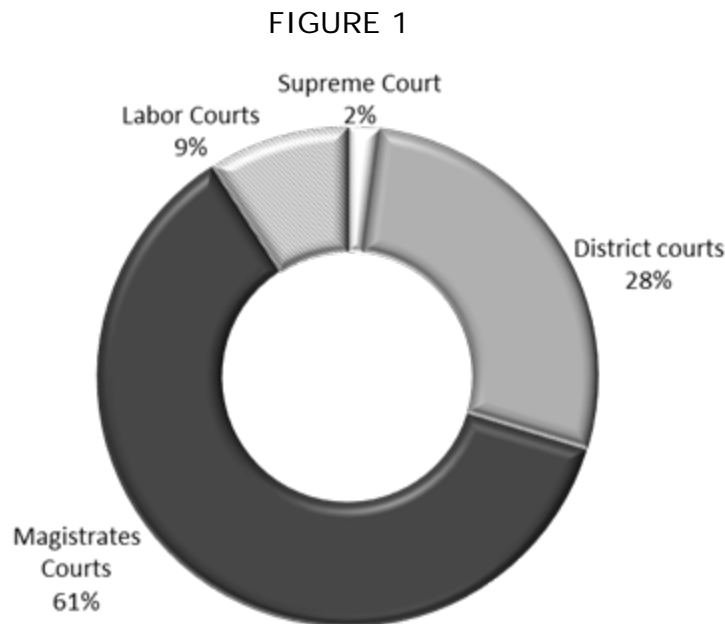


Figure 1. Division of Judiciary, Israel, 2016.

3. The Shortage of Judges

The dearth of judges in Israel may be demonstrated on the basis of international comparisons. Such comparisons should always be subject to a caveat relating to methodological problems (Fabri 2017). Yet, the comparison in this case draws a clear and important picture regarding the topic of this paper. The European Commission for the Efficiency of Justice Report (hereinafter: CEPEJ Report) from 2016 shows that in 2014, 46 European countries were surveyed including Israel (as observer state). According to the report, at that time Israel belonged to the group of nations with less than 10 professional judges for every 100,000 residents, a rate to be compared with an average of 24.6 professional judges per 100,000 residents for the total set of countries examined (The European Commission for the Efficiency of Justice 2016). If we compare only the common-law countries that were surveyed then the number of judges in Israel may be regarded as acceptable (Israel - 9, Malta – 9.5 and UK - England and Wales - 3.3). Yet, the other common-law countries in the report have a jury-system and the judicial system assigns a significant and even pre-eminent role to non-professional judges (*Idem*, pp. 90-91). Israel does not have a jury system and non-professional judges serve only in the Labor Courts in its two instances, activity that represents a very small segment of the system. Ulrike Schultz (2017, at the workshop *Too Few Judges?*, 30 June, International Institute for the Sociology of Law, Oñati) writes that in Baden-Württemberg, Germany, the average number of professional judges is 18 per 100,000 residents and in Schleswig-Holstein, Germany, the number climbs to 38 professional judges per 100,000 residents. In Israel, the number is nine professional judges per 100,000 residents. This huge difference highlights the shortage in Israel.

The insufficient number of judges in Israel is an interesting phenomenon that can be explained only through the perspective of the next two figures. Figure 2 displays the number of judges per 100,000 residents. Here we see that the number was initially very low and although there has been a change for the better in the past two decades and the number of judges has grown, the rate remains inadequate. Hence, the small number of professional judges per capita, shown in Figure 2, demonstrates how acute the scarcity of judges in Israel's courts was and remains, creating the long-term shortage.

FIGURE 2

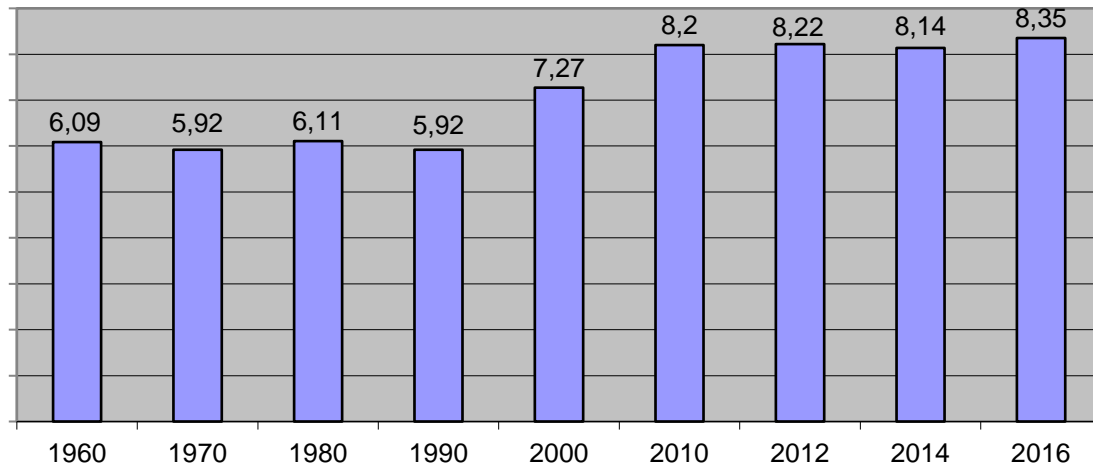


Figure 2. Number of Professional Judges per 100,000 Inhabitants, 1960-2016.

Figure 3 shows the growth in the number of judges in comparison to population growth. We can readily see that the rate of growth in the number of judges is almost consistently similar to the rate of population growth and overall even exceeded it. While the population growth between 1960 and the present is 17%, the judges' growth is 22%.

FIGURE 3

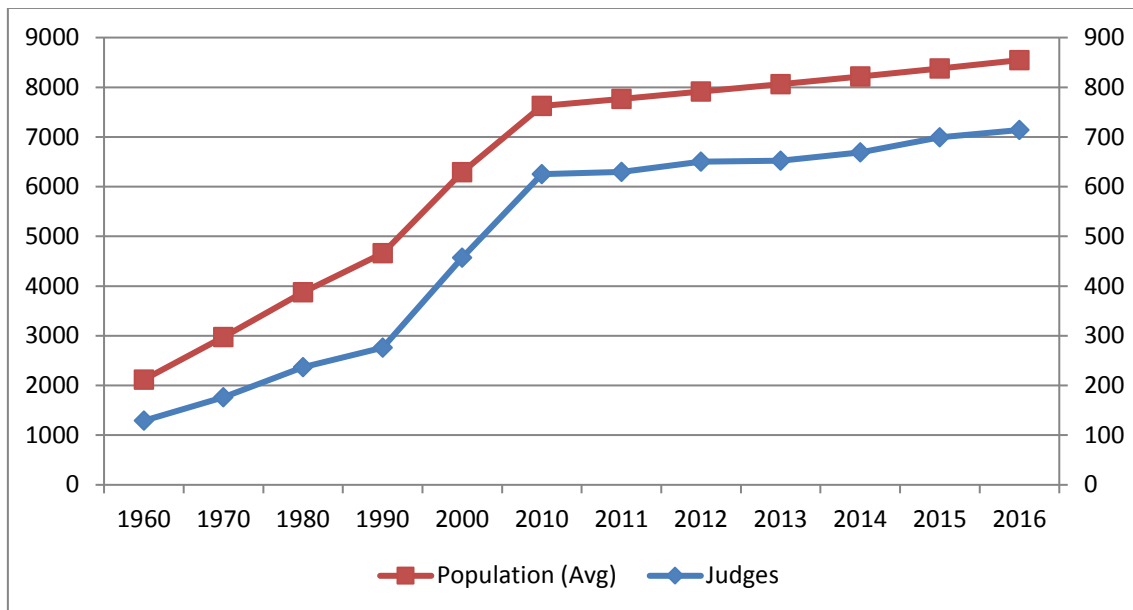


Figure 3. Growth in the Number of Judges Compared to Population Growth, 1960-2016.

However, as shown in Figure 2, the number of judges was low to begin with. Hence, the gap, between the existing number and required number continued over the years creating the long-term shortage. In other words, the shortage started from the early days of the state and although numbers kept up with the population growth, the shortage was never rectified.

The next figure explains why the shortage in the number of judges became an acute problem in the past two decades even though it had started much earlier as explained above. Figure 4 shows the ratio of lawyers to judges in Israel throughout the years. In 1960, there were 17.85 lawyers per judge in Israel; the ratio in 2016 was 87.05

lawyers per judge, almost fivefold. The ratio escalated negatively in terms of the judicial system from 2000 due to the acceleration in the number of lawyers in Israel that started in the mid-1990s (Zer-Gutman 2012). More lawyers per judge means a greater caseload created by those lawyers which eventually leads to delays in a system that already suffers from a shortage in the number of judges.

FIGURE 4

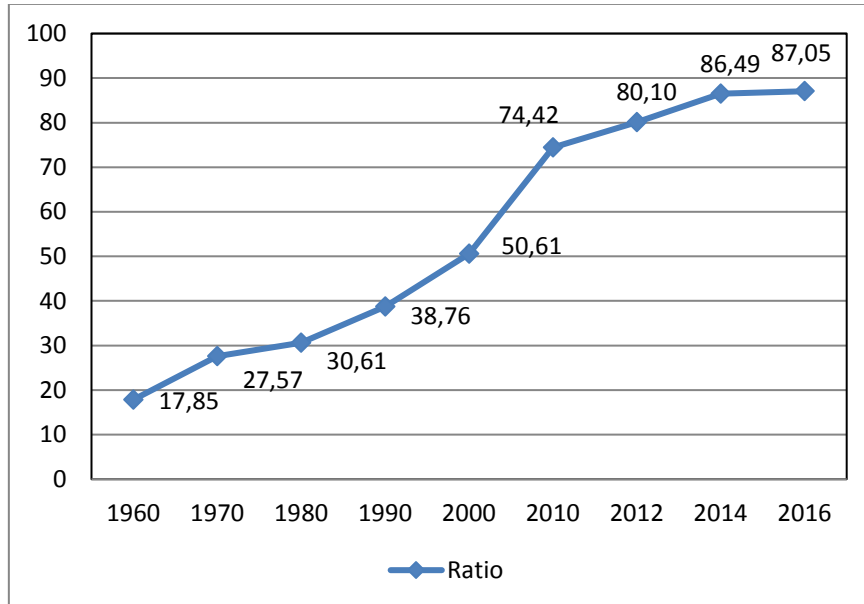


Figure 4. Ratio of Lawyers & Judges, 1960-2016.

4. The Effects of the Shortage on the Justice System

In the absence of an efficient judicial system in which legal proceedings are completed within a reasonable period of time, laws, no matter how progressive, remain lifeless. The main problem with Israel's justice system is inefficiency and drawn-out proceedings. An OECD (Organisation for Economic Co-operation and Development) report published in 2013 reveals that the average duration of first-instance proceedings in its member countries is about 240 days whereas the same proceedings, when conducted in Israel, take about 294 days. When we look at the average time it takes to complete the entire trial process – i.e., from the first hearing through to an appeal – the situation in Israel appears much worse: while the average length of the entire process is about 506 business days in OECD countries, it is 890 business days in Israel (OECD 2013). Furthermore, about 500,000 court cases annually were left open during the period 2006-2013. This figure is especially high given that about 700,000 cases are instituted annually. Moreover, in those years when the number of cases closed exceeded those opened, the backlog of cases stood at the same level (i.e., 500,000) (The Ombudsman of Complaints against Judges 2013, pp. 15-16).

Another figure testifying to the depth of the problem is found in the annual reports published by the Ombudsman of Complaints against Judges. The Ombudsman is an independent statutory body located in but separate from the Ministry of Justice. It is an objective body designed to investigate complaints made by members of the public against judges (Ministry of Justice 2013). The Ombudsman has a key role in regulating judges' behavior (Zer-Gutman 2017). Hence, its reports serve as a mirror of the judicial system's weaknesses. The reports show that almost half the complaints against judges dealing with unreasonably drawn-out proceedings and excessive delay in the handing down of judgments and rulings were found to be justified in 2010, 43% (The Ombudsman of Complaints against Judges 2010, pp. 32-33); in 2011, 28%

(2011, pp.22-23); in 2012, 36% (2012, pp.22-23); in 2013, 46% (2013, pp. 20-21); in 2014, 42% (2014a, pp. 19-20); and in 2015, 35% (2015a, pp-20-21).

Among the various causes for this situation, we can identify the culture of adjudication characterizing Israeli society, with an abundance of conflicts quickly finding their way to the courts (Mautner 2008). A comprehensive study from 2004 that investigated the judicial caseload burden in 17 countries assigned first place to Israel with respect to resident participation in legal proceedings. The study also estimated the number of court cases per 1,000 residents in each of the countries surveyed. The average for the 17 countries was 90 cases per 1,000 residents; in Israel, the number was 184 cases per 1,000 residents or twice the other countries' average (The Center for Public Management and Policy 2007, p. 18). In contrast, an OECD report entitled *Judicial performance and its determinates* from 2013 found that Israel had litigation rates comparable to that of countries exhibiting the highest performance level in terms of trial length (Palumbo *et al.* 2013).

Other reasons behind the prolongation of proceedings are the acute under-budgeting over the years; a plight that has led to a shortage of judges relative to the number of cases to be heard (The Committee for Promoting Procedural-Cultural Behavior in Courts 2011, p. 28); extensive legislation in diverse areas; and the over-abundance of lawyers (Israel finds itself in first place worldwide with respect to the number of lawyers per capita) (Zer-Gutman 2012, CEPEJ 2016, pp. 90-91, 160). Another reason worth mentioning is the system's structural defects among them is the fact that trials are not heard continuously as required by the procedural rules, but rather in installments according to lawyers' schedules. Judges make decisions about the next hearing after consulting lawyers about whether or not they are free on that particular day. Only in rare cases do judges decide in advance that there will be continuous hearings, usually in complex criminal cases.

The OECD report entitled *Judicial performance and its determinates* showed that Israel allocated more than 0.8% of that year's gross domestic product (GDP) to the courts whereas the country found in second place, Slovenia, allocated 0.5%, and the remaining countries examined invested an average of 0.25 GDP (Palumbo *et al.* 2013, p-20).¹ We should bear in mind, however, that this particular report refers solely to 2012; the OECD was unable to obtain the data necessary to compare Israel to the other countries for the previous year. As to previous years, a consistent and, for many, accurate complaint voiced by the judicial system charged that its inadequate budget was the main cause for prolonging proceedings. The CEPEJ report from 2016, page 35, shows that on average, European States spent 36€ per capita on the courts in 2014 while Israel spent 45€. Therefore, we can see that the allocation of a high court budget in Israel that probably started around 2012 continued in 2014.

The OECD report based on data from 2011 and the CEPEJ report based on data from 2014 examined the items to which court budgets were allocated and compared them to the average obtained per country. We therefore find that in Israel, 68% (in 2011) to 66% (in 2014) of the budget was allocated to salaries, which was similar to the average of 65% (in 2011) and 69% (in 2014). In addition, 10.5% (in 2011) was expended on operating costs, a figure slightly below the average of 11.6%. Another 7% (in 2011) and 13.7% (in 2014) was expended on real estate, which was above the average of 4.5% (in 2011) and 7% (in 2014). Another 5% (in 2011) and 4% (in 2014) of the budget went to covering justice expenses whereas the average was 5.5% (in 2011) and 7% (in 2014) for this item. A further 0.7% (in 2011) and 0.8% (in 2014) of the court budget was expended on education and training, which was equivalent to the average of 0.9 (in 2011) and 1% (in 2014) (The Center for Public Management and Policy 2007, p. 21; Palumbo *et al.* 2013; CEPEJ 2016, p.37).

¹ A different report measured public expenditures allocated to the judicial system, that is, the courts, the prosecution system and legal aid. Unfortunately, Israel, although included in this report, did not supply the data required for this measure. See also CEPEJ 2016, pp. 6–7.

When surveying Israel's budget, we must consider the important fact that in the past decade, Israel has invested unprecedented sums in the creation of one of the world's most advanced electronic file management system. This system makes it possible for each court case file to be maintained electronically, thus enabling judges and lawyers to retain and view every document, request and decision pertaining to the case simultaneously.² Israel consequently belongs to a group of nations excelling in every area related to IT in the courts (CEPEJ 2014, p. 14, 2016, p. 37).

The OECD report (Palumbo *et al.* 2013, p.33) suggests that Israel should adopt more advanced case-flow management techniques and promote court specialization in order to accelerate completion of proceedings.

The problem of court procrastination has elevated increased efficiency to first place on the judicial system's agenda. The Ministry of Justice is currently acting in a number of directions to remedy the situation, the first of which involves amending legislation that will facilitate court proceedings. Two public commissions were created in the past to deal with the issue and propose amendments, some of which have already been implemented. In 2014, the Ministry, together with the court management, promoted the writing of new rules of civil procedure. The second direction involves investment of resources specifically targeted at eliminating needless delay. Overall, initiation of a costly computerization project has compelled court presidents to keep track of the rate of cases handled by each judge within their divisions. In addition, methods are constantly being developed to shift the caseload between the various courts and judges. A further route to easing that burden is increasing the use of alternative dispute resolution (ADR) mechanisms, primarily mediation. To reinforce this trend, an amendment passed in 2009 to the Rules of Civil Procedure dictated mandatory pre-mediation in civil cases, during which the parties are required to attend a preliminary session with an independent court-appointed mediator. In the course of the session, the litigants, as opposed to their representatives, are required to attend a preliminary session with the mediator although they themselves can elect whether to continue the mediation (Civil Procedure Regulations 1984). We should note that mandatory pre-mediation, currently practiced in only a portion of the courts, has been so successful that in all likelihood it will be introduced into additional courts (Zer-Gutman and Perlman 2013, pp. 3, 12-13).

5. The Effects of the Shortage on Due Process

The shortage of judges, as one of the core factors contributing to prolonged adjudication, creates constant pressure to increase efficiency. In this chapter I will show that when attempting to do so, the courts occasionally circumvent due process when initiating procedures beyond the scope of their authority. These procedural innovations may even, on occasion, be revealed to be illegal. The respective infringements of due process tend to be rationalized by presenting them as "pilot studies meant to improve efficiency," and based on the parties' "mutual agreement" to accept the "innovative" procedures.

We should stress that due process is one of the cornerstones of Israel's judicial system, supporting the constitutional right to due process in all its manifestations. The main route to ensuring realization of due process is compliance with procedures established in law and in the procedural rules of court. These rules require judges to act in a uniform and egalitarian manner in all procedural matters. Any action that does not comply with these rules represents an infringement of the law. It follows that judges, together with all the parties to the dispute, are prohibited from taking any action contrary to these rules and that law. Irrespective of these infringements, the recent 2015 annual report issued by the Ombudsman for Complaints against Judges in 2016 revealed that various courts have systematically initiated new procedures, or abridged established protocols that have yet to be institutionalized in

² Implementation of the *Legal Net* IT system was gradual, beginning in 2007.

law; on occasion, these procedures overtly contradict established law. The Ombudsman concluded that the actions taken were consistently motivated by the desire to promote efficiency, that is, to reduce time spent on each case, accelerate litigation of the case, and close cases. In consequence, the judges have literally quashed the spirit of due process under the steamroller of efficiency and thereby made due process another victim of the shortage of judges.

Some examples readily demonstrate our point. The first involves a case of mediation by a Family Court judge sitting in the Central District. A complaint filed to the Ombudsman revealed that the litigants in the case had been advised to use the services of a judge-mediator who, while not presiding over the case in question, regularly adjudicated claims in that Family Court parallel to his mediation activities. As the Ombudsman of Complaints against Judges (2014b, pp. 184-190, and 2015b, pp. 50-54) stated in a detailed decision, this pilot begun in 2012 involved judges participating in mediation, conducted in collaboration with organizational counselors. The pilot was given support and recognition by the court management and the District Courts' president.

The goal of the pilot was to lighten the excessive caseload assigned to the district's Family Court judges and cut waiting time for litigants with pending cases. In order to achieve this end, the organizational consultants suggested initiating two projects: One involved the introduction of mediation by means of retired judges, whereas the other, "cross-mediation", entailed assigning a number of current experienced Family Court judges to the task of mediation in cases assigned to other judges in the same district. Within the pilot's framework, it was decided that one judge would serve as the mediator and another would sit as the deciding judge. Cases were selected for mediation from a list prepared by order of the Family Court judges. Mediation by a panel of "judge mediators" was completed only after permission had been received from all the parties.

The Ombudsman's decision regarding this pilot, stated that under current law, mediation is situated beyond the courts' jurisdiction, meaning that the courts had no authorization to act as "mediators" in the cases brought before the bench. We should therefore note in this regard that in the absence of legal authorization, any agreement by the contending parties cannot grant the judge extra-judicial authority. Only the law can do so. The Ombudsman's decision further declared that mediation is inherently different in character from adjudication. That is, the actions and proceedings permitted to mediators are prohibited to judges. A blurring of the boundaries between the two spheres is likely to damage the image of the courts and incur long-term damage to the entire judicial system. This part of the decision is contrary to a growing change in the Anglo-American legal system where a collaborative approach is being implemented in a variety of alternative judicial proceedings such as mediation proceedings (Menkel-Meadow *et al.* 2005, King *et al.* 2009).

The decision concluded by stating that in light of the mishaps revealed by the cited complaint, which involved misconduct emanating primarily from the blurring of the boundaries between mediation and adjudication, the Ombudsman recommended reconsidering continuation of the "mediation pilot" in its current form. The Family Court complied with the Ombudsman's recommendation and the pilot was ended (The Ombudsman for Complaints against Judges 2015b pp. 45-46 and 59-61). However, notwithstanding that decision, and despite the lack of legal authority or procedural rules, judges continue to practice similar forms of mediation in criminal cases within the same district's courts.³

The Ombudsman's 2015 report revealed two further problematic practices directed at increasing efficiency that is, to reduce time spent, accelerate litigation of the case, and close cases. The first of these referred to cases of damage to automobiles, the

³ See for example the following cases: *Ploni v. State of Israel* 2014, 2015, p. 4. See also Kobo, forthcoming.

majority of which are heard within the framework of fast-track proceedings, generally held during preliminary hearings and in the absence of affidavits. Even though the rules of procedure require submissions of affidavits in these cases, all Israeli Magistrates Courts prefer to ignore them; in some of these cases, judges prefer to hear and even rule despite the failure to submit affidavits. As noted in the report, the Ombudsman ruled that this practice, efficient though it may be, requires a grounding in law. In response, the President of the Supreme Court instructed all judges throughout the system to abide by the rules of procedure exclusively, and ordered the provision of affidavits as required by law (The Ombudsman of Complaints against Judges 2015a).

Another problematic *innovation* cited in the Ombudsman's 2015 report was the frequency with which Magistrates Court registrars directed litigants, in tort cases brought under the Compensation for Traffic Accident Casualties Law (1975), to present damage calculations and even offer a compromise to settle the case, without any authority in the law allowing registrars to take such measures. Here as well, the goal motivating the registrars was increased efficiency. The Ombudsman discovered that a court-appointed committee had recommended, again in the interest of efficiency, that tort cases, so many of which are assigned to judges, contain elements that are of a technical nature and could be handled by court registrars. This pilot was so successful that it was expanded allowing the registrars to offer the parties compromise- settlement that would end the dispute and close the court file. According to the law, only judges are authorized to do so. The Ombudsman (2015a) ordered this practice to cease due to the absence of its legal authority. His written summary of the issue was instructive: "The existence of a 'pilot' in any form, like the existence of data indicating 'efficiency' of the customary practice, cannot cure the essential defect of an absence of authority" (The Ombudsman of Complaints against Judges 2015a).

Opeskin (2017) describes the same method in Australia - use of quasi-judicial personnel such as registrars as a solution to court prolongation. But, as explained in his article, Parliament amended the law to delegate functions to registrars. In Israel, the delegation of functions had no basis in the law.

From my perspective, the very act of requesting that the parties agree to a procedure not grounded in law represents a violation of the right to due process. We are therefore forced to conclude that the persistent pressure to increase efficiency as a remedy to court procrastination has caused the judicial system to *bend* its procedural rules, an aberration that jeopardizes, on occasion, the exercise of due process in Israeli courts.

6. The Effects of the Shortage on the Judges

The necessity of upgrading efficiency is also deeply felt by the individual judge, who now has to fulfill a new management role, known as "managerial judging" (Resnik 1982). Although the main index for assessing a judge's performance remains substantive-qualitative – courtroom behavior, preservation of litigants' rights, verdict quality and reasoning – a quantitative index has been added, specifically, the number of cases closed. A judge's efficiency is therefore under constant review by the court management.

Another direct effect that the shortage of judges has on judges themselves is through the complaints system. More than one-third of the complaints that were found justified by the Ombudsman for Complaints against Judges (2014a, p. 19, 2015a, p. 21) concern court procrastination and delays in handing down decisions and verdicts. This is the biggest subject matter group of justified complaints making this a major concern for judges. Justified complaints are listed in the judge's personal record within the court management. The record is reviewed when the judge is considered for promotion to a higher level. In some cases when a judge has *too many* justified

complaints on his/her record- s/he might be *gently asked* to resign from office, an unpleasant procedure that can sometimes reach news headlines.

Charges have nonetheless been raised claiming that an overly aggressive assessment of efficiency by monitoring judges' caseloads undermines judges' independence and the right to a fair trial (Agmon-Gonen 2005, pp. 213, 222-227). The impact of the intensity of the review process was tragically demonstrated in September 2011, when the Israeli public was shocked to learn of the suicide of the late Maurice Ben-Atar, a Magistrate's Court judge. In a letter left behind, Judge Ben-Atar explained that his suicide was motivated by the extremely heavy workload he carried as a judge together with his inability to overcome the backlog he had amassed. The debate surrounding the incident reached the Knesset Constitution, Law and Justice Committee, which heard many objections to the overwhelming workload forced upon judges (The Knesset 2011).

With respect to the second and third instances, in 2015 the judicial system began to publicize the number of cases still open and pending a decision and how much time had elapsed since the case was opened as well as the names of the presiding judges. The action was taken following an unprecedented ruling handed down by the Supreme Court. The ruling went against the position taken by the court management, which had previously agreed to publicize the data for each judge but without mentioning individuals' names. The argument presented for not publishing the names was that such information would interfere with the system's proper functioning and conclude in humiliation and damage to the judges' reputations. The Supreme Court, sitting with an expanded bench of seven justices, rejected this argument in a majority decision (*State of Israel and Courts' Administration v. "The Marker" newspaper* 2014). Although the Court expressed worry in the decision regarding the public pressure that would be placed on judges subsequent to the publication of their names, it explained its decision by referring to the essence of the difficult and complex sphere in which judges work: the growing caseloads, the interests of the winning parties, media coverage, and so forth, with judges expected to abide by their commitment to the rule of law while rendering judgment in a relevant and professional manner (*Idem*, Justice Arbel Column 93).

We are now a year after the information was fully revealed to the newspaper that won the petition and the sky has not fallen. Actually, only one detailed article discussing the information was published in that newspaper and it received very little public attention. As expected, the article named the "slowest judges" in each district but that announcement was followed by detailed explanations given by the court management regarding each judge (Noyman *et al.* 2016). Some of the explanations were quite convincing. In my view, this move to increase transparency caused no harm to the judges themselves nor to judicial independence. Transparency is an important value and the judicial system should set an example to the other two branches of government.

7. Summary

The World Justice Project defines the rule of law as a system in which four universal principles are upheld. Principle 4 addresses the judiciary: "Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve" (World Justice Project n.d.).

This article dealt with the fifth condition, a sufficient number of judges, a requirement that has yet to be met. In a comparison to OECD member states, Israel is found at the bottom of the list, with an especially small number of judges. Figures 2-3 in the article proved that the number was low from the early days of the state so that even keeping pace with the population growth could not eliminate the shortage. Figure 4 explained why the problem became acute after 2000 when the number of lawyers accelerated and the ratio of lawyers to judges escalated dramatically.

The article discussed three main areas affected by the shortage in the number of judges.

The first area is the judicial system itself that suffers from chronic delays in the handling of cases. This problem is linked to the first condition of the above World Justice Program definition, the timely delivery of justice. The Israeli judicial system suffers from the Achilles' heel of overly prolonged proceedings. There are various causes for this problem, headed by the shortage of judges.

The second area affected is the fundamental principle of due process. The prolongation of proceedings had led courts to initiate procedures having no legal footing.

The third area affected by the shortage are the judges themselves who find themselves laboring with unreasonable caseloads and under constant pressure to close court-files that infringes on their personal independence.

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