CONFLICT RESOLUTION PROCEDURES WITHIN THE COURTROOM: BETWEEN THE ADVERSARIAL AND INQUISITORIAL TRADITIONS

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The authors wish to thank Adv. Rotem Teperberg for her excellent research and editorial assistance. This article was published in its Hebrew version in Volume 33 of BAR-ILAN LAW STUDIES – JOURNAL OF THE FACULTY OF LAW (2022).

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Abstract

Modern courts have evolved around two central legal traditions—the adversarial and the inquisitorial. The two traditions have historically reflected different approaches towards consent and authority or towards conflict resolution and strict application of the law. Yet with the blurring of boundaries between the two legal traditions, and alongside various reforms in adversarial and inquisitorial legal systems, new practices of judicial conflict resolution within the courtroom have developed. This Article will compare the two legal traditions and examine the assimilation of ideologies and procedures typical to conflict resolution processes into the work of judges, as they strive to end civil legal cases by ways other than traditional legal ruling (i.e., by settlement).

This Article argues that the integration of inquisitorial-like judicial practices within an adversarial environment contributes to the evolution of proper conditions for rich judicial conflict resolution. This is as opposed to contexts in which inquisitorial systems internalize conflict-resolution procedures into the legal system, yet the shift in how judges perceive their role is less significant. Applying practices foreign to the courtroom—practices that focus on the broader interests of the parties—minimizes the original and clear separation that the founders of the alternative dispute resolution movement envisioned as they developed alternative conflict-resolution procedures intended to be completely separate from the legal world.

The new sphere in which the adversarial judge practices, alongside rapid developments in dispute-resolution procedures, is a unique arena which enables dispute resolution under the auspices of authority. Consequently, and as litigants' expectations of the legal process have changed accordingly, the center of gravity of the legal process has shifted from the evidentiary stage to the preliminary stages (such as pretrial and discovery). This process has inevitably led to changes in the roles of litigators, rules of procedures, relative burdens of proof, and the overall management of litigation. The development of this unique sphere bears great potential for the resolution of complicated legal conflicts and for the development of innovative hybrid models for law and mediation.

I. INTRODUCTION

This Article examines the possible manners of implementation of dispute-resolution ideologies and procedures in the work of judges with an eye towards ending civil conflicts by methods other than traditional adjudication.[1]

[1] Throughout this Article, the terms "traditional adjudication" and "settlement" will be used interchangeably.

These possibilities are examined in relation to two main legal methods: the inquisitorial tradition of the continental legal systems based on civil codification[2] and the adversarial tradition of common law systems,[3] which is based on an evolution of judicial decisions developed through a system of binding precedents.[4]

Our inquiry is set against the backdrop of the institutionalization of alternative dispute resolution procedures (ADR), such as mediation and arbitration—both by means of diverting cases from within the legal system to procedures conducted *outside* the system and by way of conducting such procedures *within* the legal system by dispute settlers who are not judges. Such procedures have been promoted worldwide over the past few decades by the ADR movement. This movement has a vision of reaching comprehensive conflict resolution, or resolution that solves disputes in a broader and more just manner compared to cases that are resolved through judicial determination.[5] However, the ADR movement has only partially succeeded in achieving

[2] The term "inquisitorial" is borrowed from the ecclesiastical practice, in which the representatives of the pope conducted active investigations to discover infidels in the faith, and all by virtue of unique powers given to them for such purpose. This method determined that the inquisitor, who drew his power from the sovereign, is omnipotent in the quasi-judicial investigation proceeding, when examining the origin of suspects, investigating them, reaching conclusions and deciding their fate. *See* JOHN HENRY MERRYMAN & ROGELIO PEREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 6–38 (3d ed. 2007).

[3] For the historical development of common law in England and the United States, see KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 180–255 (Tony Weir trans., 3d ed. 1998); A. W. B. Simpson, *The Common Law and Legal Theory*, *in* OXFORD ESSAYS IN JURISPRUDENCE 77 (A. W. B. Simpson ed., 1973); Gerald Postema, *Classical Common Law Jurisprudence (Part 1)*, 2 OXFORD U. COMMONWEALTH L.J. 155 (2002); Gerald Postema, *Philosophy of the Common Law*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 588 (Jules Coleman & Scott Shapiro eds., 2004). These are two age-old traditions; the first, which has more ancient roots, developed in Europe, while the second was formed in medieval England and distributed to colonies under its control. These traditions have gained a foothold among technologically and culturally developed countries and, accordingly, have also been exported to other countries around the world.

[4] The terms "adversarial" and "inquisitorial" reflect the extent of the judge's involvement in the trial. The terms "common" and "continental" refer to the method in which the judge takes part in the creation and application of the law.

[5] The ADR movement began with the aspiration to achieve broad justice by a discourse of interests based on problem solving, and with the attempt to solve the workload problem and overcome systemic problems of the courts. The courts have a vital interest in referring cases to external dispute resolution proceedings, distinct from the benefits it has for management of the conflict itself and expansion of the feasibility of an effective solution. Whether the judge's perception originates from an ideology that advocates the consensual resolution of disputes, or whether it originates from pragmatic considerations—since for the judge, a case on their docket which is referred to mediation lessons the workload—referral is consistent with the judicial policy to encourage the mediation and amicably

its goals.[6] Nevertheless, as legal systems have become more aware of the advantages that can be gained from alternative procedures, and as these procedures have continued to evolve,[7] the institutional structure of courts has changed. Courts themselves have become institutions that can better foster the new ideology. The practice of managerial judges[8] has developed, and so has the role of special magistrates who promote settlement.[9] In addition, "problem solving courts" have been established[10] and a doctrine of therapeutic judging has developed,[11] as has judicial practice with conflict resolution as the main purpose of its procedures.[12]

This Article examines the use of alternative dispute resolution mechanisms within traditional courts. In these courts, parties arrive expecting a judicial

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ending the conflict and is also consistent with a broad social and philosophical concept which is based on consent rather than decision. Aharon Barak, *Al Hagishur* [*On Mediation*], 3 SHAAREI MISHPAT 9 (2002) (Isr.).

[6] Michal Alberstein, *Yeshuv Sichsuchim Shiputi: Al Torat Hamisphat Me'ever Lamachloket* [*Judicial Conflict Resolution: Towards Jurisprudence Beyond Dispute*], DIN UDVARIM 11, 17, 23–24, 38–39 (2018) (Isr.); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522 (2012); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"*, 19 FLA. ST. U.L. REV. 1 (1991).

[7] *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (indicating a change in the role of the traditional adversarial judge, and the development of the managerial judge since the 1970s); Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984) (coining the term "litigotiation"); Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlement*, 46 STAN. L. REV. 1339 (1994) (addressing the claim that "most cases settle," and pointing to the phenomenon of promoting settlement proceedings by judges as a significant component in their judicial role).

[8] Resnik defines the "managerial movement" as a plan to expedite the resolution of the dispute and resolution of the case, and to persuade litigants to settle instead of laying their case down for the decision of the court. *See* Resnik, *supra* note 7, at 376–80. *See also* E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306 (1986); Michal Alberstein, *Judicial Conflict Resolution (JCR): A New Jurisprudence for an Emerging Judicial Practice*, 16 CARDOZO J. CONFLICT RESOL. 879 (2015); Ayelet Sela et al., *Judges as Gatekeepers and the Dismaying Shadow of the Law: Courtroom Observation of Judicial Settlement Practices*, 24 HARV. NEGOT. L. REV. 83 (2018).

[9] For discussion on magistrates, see *infra* note 56.

[10] *See* PROBLEM SOLVING COURTS – SOCIAL SCIENCE AND LEGAL PERSPECTIVES (Richard L. Wiener & Eve M. Brank eds., 2013); Donald J. Farole Jr. et al., *Applying Problem-Solving Principles in Mainstream Courts: Lessons for State Courts*, 26 JUST. SYSTEM J. 57 (2005).

[11] Karni Perlman, *Tafkid Hashofet Haterapoiti Vehetiachsuto Lera'aionot Measkoholat Harealism Hamishpati* [*The Therapeutic Judge - A New Role in Court and Its Relationship to the Ideas of the Legal Realism School*], 26 MEHKAREI MISHPAT 415 (2010).

[12] *See* MICHAEL S. KING, SOLUTION-FOCUSED JUDGING BENCH BOOK (2009), https://aija.org.au/wp-content/uploads/2017/07/Solution-Focused-Judging-Bench-Book.pdf.

ruling: an authoritative solution that absolves them of the responsibility to reach a resolution to the conflict on their own. Judges themselves have been trained to make such rulings and usually lack any experience or training in conducting dispute-resolution procedures. Additionally, the courtroom, where dispute-resolution processes occur, lacks those basic characteristics that suit such activity and was traditionally designed in a way that reinforces the authority of the court and judge.

The application of dispute-resolution terminology and procedures within the courtroom, or alongside the legal procedure, has been referred to in various ways over the years: managerial judging,[13] judicial dispute resolution, judicial conflict resolution, judicial settlement, and more.[14] This Article assumes that we live in an era typified by changes in the perceived role of judges, both in the way the judge sees the boundaries and scope of their role, and in the perception of the parties and their counsel,[15] including an increased tendency toward judicial discretion. Accordingly, this Article will compare the two legal systems in their function as hosts of the phenomenon whereby the judge becomes an active participant in a procedure that is directed towards settlement—in other words, procedure not directed towards judicial ruling in its narrow and common sense, yet not purely mediation either.[16]

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[13] Resnik, *supra* note 7, at 376–77.

[14] *See* Mordehai (Moti) Mironi, *Al Migbalot Hapishur Veal Besorat Hagishur* [*On the Limitations of Conciliation and the Promise of Mediation*], 6 DIN UDVARIM 487 (2012) (Isr.) (characterizing judges' attempts to lead parties to a settlement as "judicial conciliation," making a distinction between this procedure and mediation). Regarding the development of the settlement-oriented judicature and Judicial Conflict Resolution (JCR) as a jurisprudence for resolving conflicts within the court, which precedes consent (over coercion) as a leading value for the application of justice, see *supra* note 5; *see also* Judith Resnik, *Whose Judgment? Vacating Judgment, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471 (1994); Karni Perlman, *Shofet Megasher? al Shfita Hesderit Ubein Matsui Leratsui Bamisphat Haisraeli* [*A Settlement Judge? On Judicial Dispute Resolution and a Proposal for Israeli Law*], 19 MISHPAT VEASAKIM 365, 389 (2015) (Isr.).

[15] *See supra* note 8; Perlman, *supra* note 11; Takanot Hadin Haezrahi [The Civil Procedure Regulations], 5778–2018, KT 8085 422 (Isr.) [hereinafter New Civil Procedure Regulations] (emphasizing the judge's scope of activity, as the director of the proceeding, in a way that allows her to more effectively direct disputes toward a decision thereon, in circumstances where the dispute was not previously resolved amicably).

[16] *See* Michal Alberstein, *Measuring Legal Formalism: Reading Hard Cases with Soft Frames*, 57 STUD. L., POL., & SOC'Y 161 (2012); RICHARD A. POSNER, HOW JUDGES THINK (2009). For the spread of the phenomenon that is not typical only of the United States and other countries operating under the common law system, see Herbert M. Kritzer, *Disappearing Trials? A Comparative Perspective*, 1 J. EMPIRICAL LEGAL STUD. 735 (2004). There is extensive writing criticizing the role of the judge as a mediator, whether as a judge whose exclusive role is mediation, or a judge hearing a case for provisional remedies, or a mediating judge who also hears the case and rules thereon. *See* Wayne D. Brazil, *Judicial*

Judicial activity in promoting settlement within the courtroom[17] is based partially on institutional-organizational design that incentivizes judges to act in this way and partially on intuitive interventions initiated by judges themselves.[18] For example, *Net-Hamishpat*, the computerized system for docket management that is used by the Israeli court system and available to the public, creates an organizational incentive for judges to use alternative means to bring parties to settle cases.[19] The publication of court rulings provides opportunities for the public to scrutinize the work of judges and their reasoning, and at times leads to wide public critique of the legal system.[20] The fact that court rulings are regularly published makes judges more cautious in their writing.[21] Moreover, any case that is settled is considered a success from an institutional-organizational point of view, as the legal system seeks to reduce judicial backlog and allow judges to devote their resources to more complex cases.[22] Judicial activity in promoting settlement is especially significant in light of the ongoing trend toward minimizing formal legal procedures[23] and the

Mediation of Cases Assigned to the Judge for Trial: Magistrate Judges Celeste F. Bremer and Karen K. Klein, 17 DISP. RESOL. MAG. 24, 25 (2011).

[17] As a rule, mediation is no longer perceived as an alternative tool for resolving disputes, but as one that is institutionally integrated into the work of the courts, within the framework of various mediation programs and in the existence of mandatory mediation in some legal systems. *See* Council Directive 2008/52/EC, 2008 O.J. (L 136) 3 (dealing with specific aspects of mediation on civil and commercial issues) [hereinafter Directive 2008/52]. *See also* ELAD FINKELSTEIN, HAMISHTAR HAMISHPATI SHEL HALICH HAGISHUR [THE LEGAL REGIME OF THE MEDIATION PROCEEDING] 213 (2007) (Isr.); §§ 99A–99K, Civil Procedure Regulations, 5744–1984, KT 4685 2210 (Isr.) [hereinafter Old Civil Procedure Regulations] (regulating the Information, Acquaintance and Coordination (IAC) meeting to examine the possibility of settling a claim in mediation, and authorizing the court to impose a sanction on a party who did not appear for the IAC meeting, *see* Section 99G(c)).

[18] Galanter & Cahill, *supra* note 7, at 1342–46 (showing studies that judges are highly motivated to avoid reaching judicial decisions in the cases before them, and this is one of the reasons why most cases end in a settlement).

[19] *See* Yair Sagy, *Lamenazheah Shir Mizmor? Likraht Nithuah Ergoni shel Ma'arechet Batei Hamishpat Beisrael* [*Orchestrating the Judiciary? Towards an Organizational Analysis of the Israeli Judiciary*], 16 MISHPATUMIMSHAL – HAIFA U.L.J. 65, 95–98 (2014) (Isr.) (arguing that the court's system is an "organization," as defined in the theory of organizations and putting an emphasis on processes of dissemination of information within the organization, including decision-making procedures and the integrative organizational incentive that is inherent in the publication of court rulings (the informative paradigm)).

[20] *See, e.g.*, Resnik, *supra* note 7, at 414–16.

[21] *See* Amnon Reichman et al., *From a Panopticon: The Use and Misuse of Technology in Regulation of Judges*, 71 HASTINGS L.J. 589, 629–33 (2020); ISSACHAR ROSEN-ZVI, HA'ALICH HAEZRACHI [THE CIVIL PROCESS] 90 (2015) (Isr.).

[22] *See* Issachar Rosen-Zvi, *Bizur Ma'arechet Hasphita Beisrael: Hatafkid Hanistar shel Sidrei Hadin* [*The Decentralization of the Israeli Judicial System: The Hidden Role of Procedure*], 46 MISHPATIM – HEBREW U.L.J. 717 (2017) (Isr.).

[23] *See* Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 646–48 (1994). This article describes processes in the years 1938–

"vanishing trial" phenomenon,[24] where legal determination following a full trial has become a last resort, at least in some legal systems.[25]

This Article will examine the ways in which the promotion of ADR by judges is related to the characteristics of the legal system—whether adversarial or inquisitorial—given the structural and organizational changes that the system has undergone. This Article will explore how these changes impact the traditional role of the judge, taking into account the legal environment in which judges were educated and practice, and how these changes play out in the routine management of litigation in civil cases.

The integration of practices originating from the inquisitorial tradition within an adversarial judicial environment creates the grounds for efficient judicial activism and initiatives which may promote consent among parties. Such judicial activity is made possible, among other reasons, by the procedural aspects inherent to common law systems, alongside rapid increases in judicial discretion and the unique role of the judge in this framework. Such leeway is not present in the civil system, where judges play a more technical role, and where their discretion is limited to applying the legal code as the sole conceptual basis for resolving the conflict at hand. Therefore, judges' initiatives to promote settlement in inquisitorial legal systems will manifest, mainly, in directing parties to out-of-court conflict-resolution processes or in

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1990 in which the change in the civil procedure of federal courts in the United States (rules which were later assimilated into State courts) resulted in a dramatic reduction in the number of cases that were judicially decided and most cases filed ended by way of the claim being summarily dismissed without prejudice, settlement in or outside of the courtroom and other arrangements. The trial does not vanish (as opposed to the vanishing trial phenomenon) but is rather important in the preliminary proceedings, where many decisions are issued that help the parties formulate a position for settlement. *See also* Michal Alberstein & Nourit Zimerman, *Judicial Conflict Resolution in Italy, Israel and England and Wales: A Comparative Analysis of the Regulation of Judges' Settlement Activities*, *in* COMPARATIVE DISPUTE RESOLUTION 298 (Maria Federica Moscati et al. eds., 2020).

[24] Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, Langbein, *supra* note 6; Peggy Fulton Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-First Century: The Evolution of the Revolution in Problem Solving*, 42 GA. L. REV. 717, 747 (2008). With respect to pleas, see Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004). Regarding the reasons for the phenomenon in England and Wales, see Robert Dingwall & Emilie Cloatre, *Vanishing Trials?: An English Perspective*, 2006 J. DISP. RESOL. 51. This process reflects cultural and structural changes and economic constraints that have affected the justice system in recent decades.

[25] The multiplicity of arrangements and the vanishing trial phenomenon do not exist in the same extent in all legal systems. For example, while in the United States less than 1% of cases end in a full decision, in Italy most cases are decided. *See* Alberstein, *supra* note 6, at 23; Galanter & Cahill, *supra* note 7; Alberstein & Zimerman, *supra* note 23, at 310–11. *See also* Keren Weinshall-Margel et al., *Yetsirat Madad Meshkalot Tikim Leha'arachat Haomes Hashiphoti Beisrael* [*Creating a Case Weights Index for Assessing the Judicial Workload in Israel*], 44 MISHPATIM 769 (2015) (Isr.).

convincing the parties to consent to a certain proposed outcome that is in accordance with relevant legal code.[26]

The expansion of the realm of judicial discretion in the adversarial procedure taken together with the dissemination of inquisitorial-like tools,[27] mainly the pretrial stage, creates hybridization. In effect, it turns the adversarial procedure into fertile ground for the promotion of dispute-resolution procedures conducted by judges who also rule on the case. Such procedures usually promote narrow consent and do not fully implement the deep perceptions and ideology of the field of dispute resolution. Nevertheless, such procedures do provide an efficient tool that promotes consent among parties and extends the boundaries of the legal realm as we know it. The center of gravity of the civil case thereby shifts from determination of legal and evidential controversies at trial (i.e., evidential hearings and cross-examination) to settlement during the preliminary stages of the process.[28]

Part II of this Article will initially review the differences between the civil and the common law systems and the role of the judge within each. In Part III, we will briefly discuss the blurring of boundaries between the two legal systems and how they have borrowed from one another, thereby influencing the role of judges in both systems and giving rise to hybridization. Part IV will explore conflict-resolution procedures within specific adversarial legal systems, examining the United States, Israel, and England. Each system will allow us to draw different conclusions regarding the implementation of mediational frameworks and inquisitorial tools within the work of judges. This Article will use Israel as a prominent example of the trend described here, in light of a substantial reform recently adopted in the Israeli rules of civil procedure. This will enable us to closely analyze a few examples of continental-like procedures adopted by a common law legal system and assimilated into the adversarial process, including the authority of judges in the pretrial stage, judgment by way of compromise (according to rule 79A of the Israeli Courts Law), and the doctrine of the inherent jurisdiction of the court.[29] These techniques are applied at different stages of judicial intervention. The pretrial stage serves as a preliminary ground where the judge may attempt to employ conflict-resolution procedures. Judgment by way of compromise is a judicial tool

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[26] To learn about the role of the inquisitorial judge from the examination of discovery proceedings, see Geoffrey C. Hazard, Jr., *Discovery and Role of the Judge in Civil Law Jurisdictions*, 73 NOTRE DAME L. REV. 1017 (1998).

[27] Even if they are not borrowed from the procedures applied in civil code countries, they still allow for a wide range of intervention and active action on the part of the judge in the procedure of the case being conducted before her or in the nature of the issues that require a decision.

[28] Rosen-Zvi, *supra* note 22, at 736–41.

[29] While this doctrine was developed within the adversarial system, its characteristics resemble judicial activism that is more typical of inquisitorial judges.

that may be used during any stage of the legal process[30] and the inherent jurisdiction of the court is integrated into the final judicial ruling itself. We will then examine judicial conflict-resolution procedures in other adversarial systems: England and Wales and the United States. The role of the judge in the continental tradition will be presented in Part V, where we will review codification that expands the judge's discretion and their authority to act as conciliators and mediators in this tradition. We will contextualize the limited scope of judicial discretion of the inquisitorial judge and briefly examine specific legislation that authorizes the judge to perform dispute-resolution activities within the courtroom or to direct parties to an out-of-court dispute resolution process, mainly mediation. Part VI will conceptualize the phenomena described regarding the two systems, especially in the adversarial setting, where a marked shift of the center of the legal process to its preliminary stages can be clearly identified. The implications of this phenomena will also be discussed. Finally, we will present our conclusion regarding the role of judges and the future of civil legal procedures more generally.

II. THE INQUISITORIAL AND ADVERSARIAL METHODS

A. Discerning Principles

The attitude towards counsel, litigants, and judges in each legal tradition offers varying grounds for the assimilation of dispute-resolution procedures within the courtroom. This section will review the advantages and disadvantages of each system in this regard, providing examples from legal systems in various countries which can clearly be identified as maintaining either the adversarial or inquisitorial traditions.

While continental law is based on structured ideology, common law has developed in fragments as a result of the historical circumstances in England throughout the years, and is still maintained as such.[31] The adversarial system is typically described as striving for "justice on the merits," while the inquisitorial system aspires to provide "access to justice" for all.[32] This distinction

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[30] Chemi Ben-Noon & Amos Gabrieli, *Iikov Hadin at Hapshara? Lebikoret Seif 79a Lechok Batei Hamishpat, Hatashmad-1984* [*Will the Law Override Settlement? Critique of Section 79A of the Courts Law, 5744-1984*], 46 HAPRAKLIT 257, 260 (2003) (Isr.); Menachem (Mario) Klein, *Hatza'a Leshimush Benuscha Madait Letzorech Chishuv Aritmeti shel Psak Din Lefi Seif 79A(a) of the Courts Law* [*Proposal for Use of a Scientific Formula for Arithmetic Calculation of a Judgment Under Section 79A (a) of the Courts Law*], PSAK DIN – ISRAELI LAW WEBSITE (Oct. 27, 2008) (Isr.), https://tinyurl.com/qpfmjgr.

[31] This tradition was influenced by a liberal and even neo-liberal worldview later on. *See* ROSEN-ZVI, *supra* note 21, at 97.

[32] Adrian A. S. Zuckerman, *Justice in Crisis: Comparative Dimensions of Civil Procedure*, *in* CIVIL JUSTICE IN CRISIS: COMPARATIVE PERSPECTIVES OF CIVIL PROCEDURE 3, 12, 16–18 (A.A.S. Zuckerman ed., 1999).

originates both from the different litigation costs in each system,[33] as well as the time required to reach judgments.[34] These characteristics provide context for the extent of the cooperation of different legal systems with the movement toward alternative dispute resolution.[35]

The civil law tradition predates the common law tradition, and its origins are attributed to the publication of the twelve tables of Roman Law in 450 BCE.[36] Civil law is the most common legal system worldwide, but it exists mainly in Europe, Latin America, and many parts of Asia and Africa.[37] The civil law tradition supports the principle of separation of powers and the perception that the judiciary should completely avoid any intervention in legislation. Conversely, in the common law tradition, judicial intervention in the creation and interpretation of laws is legitimate and even desirable.[38]

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[33] Emery G. Lee III, *Law Without Lawyers: Access to Civil Justice and the Cost of Legal Services*, 69 U. MIAMI L. REV. 499 (2015); DEBORAH L. RHODE, ACCESS TO JUSTICE (2004); REFORM OF CIVIL PROCEDURE: ESSAYS ON 'ACCESS TO JUSTICE' (Adrian A. S. Zuckerman & Ross Cranston eds., 1995); HARRY WOOLF, ACCESS TO JUSTICE: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES 78–90 (1996); LITIGATION, COSTS, FUNDING AND BEHAVIOUR: IMPLICATIONS FOR THE LAW (Willem H. van Boom ed., 2017); Matthias Kilian, *Alternatives to Public Provision: The Role of Legal Expenses Insurance in Broadening Access to Justice: The German Experience*, 30 J.L. & SOC'Y 31 (2003). There are many differences in the costs of conducting proceedings between common law countries. While in England and the United States trial costs are very high, especially relative to the size of the case, in Israel the order of costs does not reflect the real cost of litigation, and the court has a broad discretion with respect to awarding costs and setting their amount. §§ 511–12, Old Civil Procedure Regulations, *supra* note 17. *See also* Keren Weinshall & Yifat Travolus, *Psikat Otsaot Misphat Behalichim Ezrachiim* [*Awarding Trial Costs in Civil Procedures*], 46 MISHPATIM 763 (2017) (Isr.); Theodore Eisenberg et al., *Attorneys' Fees in a Loser-Pays System*, 162 U. PA. L. REV. 1619 (2014).

[34] A trial as lengthy as to amount to unreasonableness is not a just trial. *See* Moshe Gal, *Reforma Besad'a - Hakdama* [*A Reform in Civil Procedure – Introduction*], 9 MISHPATIM AL ATAR 1 (2016) (Isr.).

[35] The ADR movement enables the classification of disputes and the adapting of the forum to the dispute, in order to streamline the legal system. MICHAL ALBERSTEIN, TORAT HAGISHUR [THE THEORY OF MEDIATION] 74 (2007) [hereinafter ALBERSTEIN, THE THEORY OF MEDIATION]; Alberstein, *supra* note 6, at 39; Frank E.A. Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1 (2006); JA Jolowicz, *Adversarial and Inquisitorial Models of Civil Procedure*, 52 INT'L & COMPAR. L.Q. 281, 289 (2003); Mauro Cappelletti, *Alternative Dispute Resolution Process Within the Framework of the World-Wide Access-to-Justice Movement*, 56 MOD. L. REV. 282 (1993).

[36] MERRYMAN & PEREZ-PERDOMO, *supra* note 2, at 2.

[37] *Id.* at 2–4.

[38] Parliamentary legislation is subject to judicial review and thus the judge contributes to the shaping of the legal system. In this way, the sovereign is limited and obligated to carry out its duty, under the watchful eye of the judicial authority, which has the ability to decide whether an action of a governing body is within the range of legality. Conversely, continental law prohibits judges from interfering in matters unrelated to the trial itself, in a

The desire of modern citizens to be subject to decisions based on human principles of justice[39] is in keeping with the perception of law as a collection of primary and secondary rules.[40] According to this conception, legal norms originate from within society and formal law should reflect these very norms. The role of the judge is to seek the truth and apply the law, having allowed the parties to present factual and legal arguments in the manner and scope determined by the procedural rules of each system. Each legal tradition has then designed its procedures accordingly, in the way that best promotes the search for legal truth and procedural efficiency.

Some argue that the adversarial system has been developed as an optimal mechanism for the resolution of disputes, but not necessarily for revealing the truth.[41] Given this claim, this Article will examine whether the characteristics

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manner that creates a clear dichotomy between the independent legal fabric and the administration of State and sovereign authority. *Id.* at 16–17.

[39] ROSEN-ZVI, *supra* note 21, at 34–35.

[40] H.L.A. HART, THE CONCEPT OF LAW (3d ed. 2012). Hart presents a perception whereby modern law starts with a relatively homogeneous society, in which social norms and conventions develop in terms of primary rules. These are enforced in a small community through criticism and social pressure on those who do not comply therewith, and are perceived by its members as a basis for appreciation and criticism. The primary rules are not sufficient when disputes arise as to the question of their existence and scope, as well as in the question of how to apply them in concrete disputes and adapt them to changing circumstances. In response to these rules, secondary rules have developed—the rule of identification, the rule of judgment, and the rule of change—that characterize the transition of the community to a more pluralistic state framework, with the law being a unification of primary and secondary rules. See also the perceptions of Hans Kelsen and Joseph Raz as described in J. W. HARRIS, LEGAL PHILOSOPHIES (2d ed. 2004); JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (2d ed. 2009). *But see* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

[41] Jolowicz, *supra* note 35, at 283–87; Alberstein & Zimerman, *supra* note 23, at 311; *see* ROSEN-ZVI, *supra* note 21, at 95, 115–17. The conflict stems from a different view of cognitively biased parties regarding their rights and the clash that results therefrom. The assumption underlying the dispute is that in a sphere where there are fixed and limited resources, an advantage given to one necessarily leads to another's disadvantage. Hence the need to search for an empirical truth, which alone can give preference to one type of need, value, or purpose over the other type. Even if there is a clear distinction between factual and legal truth and the purpose that each one of them represents, the pursuit of truth was perceived as the essence of the adversarial procedure. *See* Nina Zaltzman, *"Emet Uvdatit" Ve"emet Mishpatit – Meniat Meida Mebeit Hamishpat Leshem Hagana al Arachim Chevratiim* [*"Factual Truth" and "Legal Truth" – Denying the Court Information to Protect Social Values*], 24 IYUNEI MISHPAT 263 (2000) (Isr.). *See also* Ray Finkelstein, *The Adversarial System and the Search for the Truth*, 37 MONASH. U. L. REV. 135, 136 (2011). Finkelstein believes that although truth is the purpose of the adversarial system, such goal is not achieved in the way the system is conducted in Australia, where only a fundamental change therein towards a concept of dispute management can and will give it tools to achieve the truth. The truth, according to the writer's approach, can therefore be illustrated in a way that is not necessarily comparable. *See also* Marvin E. Frankel, *The Search for*

of the adversarial system are indeed more amenable to dispute-resolution processes. That is, this Article will determine whether adversarial systems are geared toward ending conflicts, even at the cost of, as critics might perceive, foregoing the aspiration to bring justice or reveal the truth. Conversely, this Article will ask whether judges in inquisitorial systems, who actively take part in seeking the truth, are therefore limited in their inclination toward taking part in any alternative procedure, which does not necessarily end with a clear determination of legal and factual truth.

The discussion of the role of judges in the two legal traditions assumes that judges' decisions are based on rational grounds, and that judges' conclusions are formed in light of the arguments and justifications that are brought before them by the parties. Legal thinking is rational, both essentially and formally, and distinguishes itself from emotion[42] or intuition in a way that meets the expectations of parties and is aligned with the authority at the heart of the role of the judge.[43]

B. Two Traditions: Characteristics and the Roles of Different Actors

The adversarial system is characterized by significant control over the procedure by the parties, while maintaining minimal judicial intervention in the process.[44] The ideological basis for this procedural design is the protection of individual liberties in a democratic society.[45] The practical objective is derived from the perception that the parties are the main stakeholders in the process. More than any external party (who they did not choose, like the judge), the parties hold the best interest to present their case in the optimal and least costly manner. When the parties' overall interests are represented in the best manner possible, the judge is provided with the full picture in a way that

Truth: An Umpireal View, 123 U. PA. L. REV. 1031 (1975). It is also interesting to see Chemi Ben-Noon, *Hataiot Cognitiviot Vehachlatot Shiputiot Intuitsia Vehashiva Sdura Bemelachto shel Hashofet* [*Cognitive Biases and Judicial Decisions Intuition and Methodical Thinking in the Judge's Work*], 5 SHAAREI MISHPAT 177 (2010) (Isr.), which deals with cognitive biases in the judges' discretion when making decisions.

[42] *See* Yofi Tirosh & Adam Shinar, *Empathaia Metakenet* [*Affirmative Empathy*], 15 LABOR SOC. L.J. 37 (2018) (Isr.) (discussing the judicialization of empathy and the setting of normative standards that require employers to consider empathy in their treatment of employees, along with the difficulties found by the writers in the use of empathy in the legal sphere).

[43] ALBERSTEIN, THE THEORY OF MEDIATION, *supra* note 35, at 45.

[44] ROSEN-ZVI, *supra* note 21, at 97.

[45] *Id.* at 95–97; Jerry Mashaw, *Administrative Due Process: The Quest for Dignitary Theory*, 61 B.U.L. REV. 885, 907 (1981).

facilitates reaching a worthy legal outcome.[46] It is the conflictual environment that affords the parties the opportunity to present the whole of their argument with the goal of uncovering the truth.[47]

The parties' control over the litigation process manifests in their choice of how to open the case, how to frame arguments in their briefs (which they are then bound by), which witnesses are called to testify, the manner of examination of witnesses, and the overall pace and management of the case.[48] A key feature of the parties' control over the process is their ability to raise any argument they wish in their pleadings without the need for any kind of evidentiary support at the preliminary stage.[49] Consequently, the actual disagreements between the parties are in effect exaggerated because they are based on the understanding that the legal struggle between the parties will ultimately end on a middle ground tolerable to both parties. From the outset, this dialectic forms a problematic starting point for negotiation towards settlement, making it difficult for any dispute settler, especially during the early stages of litigation, to separate the wheat from the chaff in order to determine the actual points of dispute between the parties (a necessary stage for any resolution process). Litigation of this sort in court entails significant costs in extensive legal fees and resources, expert witness time, and other expenses.[50]

Judges in common law systems hold wide discretion in their application of the law. Various movements in American law in the previous century created models of judicial decision-making which involve judicial discretion, balancing principles of the law with purposes of the law, and the search for proportionality and complex formulae in judicial decisions.[51]

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[46] Dudi Schwartz, *Techulato shel Ikaron Tom-Halev Beseder-Hadin Haezrachi* [*The Application of the Principle of Good Faith in Civil Procedure*], 21 IYUNEI MISHPAT 295, 306–07 (1998) (Isr.).

[47] *See* sources and accompanying text cited *supra* note 41. Wigmor's writing applies this rationale to describe the benefits of cross-examination as a tool for exposing the truth. JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW: INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES (1904); ROSEN-ZVI, supra note 21, at 36–41. Jolowicz, on the other hand, argues that while the cross-examination is likely to expose lies in the testimony, the claim that it can expose the hidden truth, i.e., those facts that were not revealed in court, is far-reaching. *See* Jolowicz, *supra* note 35, at 283. *See also* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 355–56 (1978).

[48] *See* Schwartz, *supra* note 46, at 307 n.28 (describing the processes of litigants controlling the entire proceeding).

[49] This is except where the regulations require attaching certification affidavits at the stage of filing the initial pleadings. *E.g.*, § 258H, Old Civil Procedure Regulations, *supra* note 17.

[50] *See* Hein Kotz, *Civil Justice Systems in Europe and the United States*, 13 DUKE J. COMPAR. & INT'L. L. 61, 63–65 (2003).

[51] These models were also assimilated in the international courts of the European Union and gained a foothold in Israel with regard to the use of purposive interpretation and other

These tools have strengthened the status of judges. They have transformed them from serving as the mouthpiece and emissary of the legislature to participating as distinguished partners of the legislature, partners who exercise discretion in their application of the law.[52] This process has evolved while balancing a change in values with the strict framework of the law, accompanied by considerations of public policy and the desire of the judiciary to serve as an effective player in processes of societal improvement. The judge in a common law system, faced with critique of the formalities of legal rules, operates within a field of discretion while deciding any conflict. Such leeway allows for the passing of more abstract rules since their interpretation is at the hand of judges. This role—of "law creators" who apply the law in an instrumental manner and balance principles anew—awards judges a highly significant role, empowers them, and even turns them into role models as they create precedents and shape legislation.[53]

Due to the central role of lawyers in managing the adversarial process and the role of the judge as a "supervisor" who restrains herself from intervening in the proceedings,[54] the number of judges required in the system is relatively low.[55] In addition, there are judges who are not jurists[56] who sit, for example,

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tools of balance and discretion. For more information on judicial discretion and the deviation of the legal text from formalist principles, see POSNER, *supra* note 16; MENACHEM MAUTNER, YERIDAT HAFORMALIZEM VEA'ALIAT HA'ARACHIM BAMISPHAT HAISRAELI [THE DECLINE OF FORMALISM AND THE RISE OF VALUES IN ISRAELI LAW] (1993) (Isr.); AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW (Sari Bashi trans., 2005); SHLOMO LEVIN, LIHIYOT SHOFET [TO BE A JUDGE] (2009) (Isr.); Michal Alberstein, *Hara'ayon Hapragmati Bamishpat Ubeyeshuv Sichsuchim: Anatomia shel Torot Misphat Mishtanot* [*The Pragmatic Idea in Law and in Conflict Resolution: Anatomy of Evolving Jurisprudential Theories*], 5 MISHPAT VE'ASAKIM 55 (2006) (Isr.).

[52] For the distinction between the image of the law as the goddess of justice that decides between the parties and the sovereign who walks the land and states the law, see Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2–3 (1979).

[53] MERRYMAN & PEREZ-PERDOMO, *supra* note 2, at 34–35. Note that the common law develops, in practice, through lawyers and judges and not necessarily in academia or parallel studies. *See* Adam Hofri-Winogradow, Professor of Law at the Hebrew University of Jerusalem, *Roman and 'Continental' Law in and Before the Age of Codification* (lecture as part of the course titled Systems and Traditions in Law) (Jan. 8, 2011).

[54] Schwartz, *supra* note 46, at 307–08.

[55] MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES ON WESTERN LAW 312 (3d ed. 2007).

[56] In the courts of England and Wales, magistrates, also known as Justices of the Peace (JPs), serve in the courts—these are volunteers without legal education who serve as judges in cases dealing with specific offenses (for example, summary offenses) and sometimes in family courts—and are authorized to decide in the frameworks defined for them by law (for example, a sentence of up to 12 months' imprisonment). The magistrates have other powers such as issuing search warrants to the police and other authorities, they undergo basic and brief legal training throughout their term, they are accompanied by magistrates with at least three years of experience, and they receive ongoing advice from expert legists.

in unique conflict resolution procedures.[57] This tradition allows for the co-existence of several legal systems in the same territory: state instances alongside instances not run by the state. For example, rabbinical or church instances are awarded the same source of authority.[58] This approach stems from legal pluralism, which is typical to the common law system and in fact defines it.[59]

Rules of procedure in systems with adversarial characteristics are designed to expropriate from the judge, as much as possible, the ability to determine the course of the litigation process, limiting the judge, as well as the litigants themselves.[60] The determination of the scope of the dispute and the information on which the judge will base her decision are both put in the hands of the litigants as an inherent characteristic of the adversarial process.[61] This framework defines and maintains external rules for its officials, thereby decentralizing and limiting their power. Rules of procedure are designed to control for potential procedural chaos which can lead to injustice. The purpose of the procedural rules is to lead the parties, and especially the judge, down a clear, structured path which begins with filing the lawsuit, continues in its management, and ends with a court ruling. Each party has an equal procedural opportunity to present its arguments in accordance with the procedural framework. This is a mechanism of procedural justice intended to prevent the imposition of the government's values through the management of the process by the government's agent on the bench (i.e., the judge). The rules of procedure in the adversarial system thus serve as the "watchdog," protecting the essential rights of the litigants.[62]

Magistrates, CTS. & TRIBUNALS JUDICIARY (2022) (UK), https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/magistrates. *See also* R. H. Maudsley & J. W. Davies, *The Justice of the Peace in England*, 18 U. MIAMI L. REV. 517 (1964).

[57] *See* § 2, Labor Court Law, 5729–1969, SH 553 70 (Isr.) ("[j]udges and representatives of the public shall be appointed to the court.").

[58] *See, e.g.*, § 1, Jurisdiction of Rabbinical Courts Law, 5714–1953, SH 134 163 (Isr.).

[59] Ruth Halperin-Kaddari, *Pluralism Mishpati Beisrael* [*More on Legal Pluralism in Israel*] 23 IYUNEI MISHPAT 559–77 (2000) (Isr.); Adam Hofri-Winogradow, *Hitatzmut Hapluralism Hamishpati Beisrael: Aliyatam Shel Batei Hadin Hahilchatiim Ledinei Mamonot Bamigzar Hatzioni-Dati* [*The Accelaration of Israeli Legal Pluralism: The Rise of the New Religious-Zionist Halachic Private Law Courts*], 34 IYUNEI MISHPAT 47, 59, 65–68 (2011) (Isr.).

[60] Oscar G. Chase & Vincenzo Varano, *Comparative Civil Justice*, *in* THE CAMBRIDGE COMPANION TO COMPARATIVE LAW 210, 212, 220 (Mauro Bussani & Ugo Mattei eds., 2012); Jolowicz, *supra* note 35, at 289; Neil Andrews, *The Adversarial Principle: Fairness and Efficiency*, *in* REFORM OF CIVIL PROCEDURE: ESSAYS ON 'ACCESS TO JUSTICE' 169 (A. A. S. Zuckerman & Ross Cranston eds., 1995); SHLOMO LEVIN, TORAT HAPROTSEDURA HA'ERZRAHIT MAVO VE'EKRONOT YESOD [THE THEORY OF CIVIL PROCEDURE – INTRODUCTION AND BASIC PRINCIPLES] 121–33 (1999) (Isr.); ROSEN-ZVI, *supra* note 21, at 21–24, 97–98.

[61] Jolowicz, *supra* note 35, at 289; Andrews, *supra* note 60.

[62] Schwartz, *supra* note 46, at 306.

Under the inquisitorial tradition, the situation is entirely different. The procedures of the inquisitorial system expresses a clear preference toward the principle of equality over the principles of liberty and autonomy.[63] The judge—whose role is to examine the facts according to the relevant code—is in control of the litigation process, and the parties and their counsel play a very limited role.[64] The latter submit their pleadings, append the evidence, and recommend witnesses who can potentially support their case. From this point on, control over the process is given to the judge, who actively participates in the search for truth, examines the evidence, and constructs the court file (dossier), which is based on written documents. The weight of oral testimony is less significant than that of written evidence; the judge is the one who searches for relevant witnesses, questions them,[65] and, if necessary, appoints expert witnesses. She does so all under the supervision of the parties and their counsel, whose role during these stages is limited to assisting the court.[66]

That said, the judge's role in determining the case is limited to finding the relevant law and applying it to the specific case before her. Judges do not have the authority to turn to other legal sources, except for some support from academic writing.[67] In the same manner, the judge cannot rely on precedent and must focus on the instant case while searching for the solution in existing statutes, under the assumption that any existing legal situation ultimately has one possible legal solution.[68] In order for the judge to be able to apply the law to any possible case, there is a need for clear and very detailed legislation, which does not leave room for any doubt regarding which is the relevant law. Detailed and complicated legal codes are intended to make redundant the need to interpret the law. The legal code is built from the abstract to the concrete, in complete contrast to the casuistry that is typical to common law systems.[69]

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[63] ROSEN-ZVI, *supra* note 21, at 34–35.

[64] Chase & Varano, *supra* note 60, at 220–24; MERRYMAN & PEREZ-PERDOMO, *supra* note 2, at 30, 33–35.

[65] As opposed to the adversarial judge, who will not summon a witness on her own initiative even if she believes that he is a key witness and will even restrain herself from interfering in the interrogation of the witnesses. *See* Schwartz, *supra* note 46, at 307.

[66] ROSEN-ZVI, *supra* note 21, at 165–66.

[67] MERRYMAN & PEREZ-PERDOMO, *supra* note 2, at 24–25, 35–36.

[68] *Id.* at 23.

[69] *See id.* at 39–47. The clear difference between the foundations of legislation of the different traditions was reflected in the academic discussion held in countries that apply the Sharia system, in which the laws are divided into five different categories, including a category of laws that can be applied but not required. Violation of this category, being only a recommendation, does not entail a sanction. In this tradition, there is a great resemblance to the continental system with respect to the existing hierarchy between the types of legislation (such as constitution versus ordinary legislation). NECHEMYA LE-BEN-ZION ET AL., 2 HAISLAM: MAVO LEHISTORIA SHEL HADAT [ISLAM: INTRODUCTION TO THE HISTORY OF RELIGION] 11–13 (1998). But unlike this tradition, it is not made up of general and comprehensive legislation, with the proposal for a complete codification being rejected. *Id*. at

The sources of continental law are heterogeneous and originate from different historical periods.[70] The existing differences between legal systems in various countries are also a result of the development of national legal systems in each of the central European countries that act under this legal tradition. Despite the differences, the origin of legal principles in these countries typified by shared principles are in the tradition of the *Code civil*.[71] As opposed to the custom in common law, the rulings of continental judges are not considered laws, which can only be created by the legislative branch.[72] Judges are required to rely only on written law in their rulings, and not on the work of scholars or precedent. The perception is that the code provides a solution to any legal problem without leaving room for judicial discretion. Even in the case of a lacuna in the law, there are still clear guidelines as to how the judge must proceed in accordance with the concrete case.[73]

The status of the judge in the continental tradition varies between different countries and, therefore, so does the perception of the role of judges. In some countries, judges are perceived as clerks, and their status is equal to that of other public servants. In others, one can choose the path to become a judge as one of the career options that are offered to graduates of a law degree.[74] In some places, a law graduate can take a test that would authorize him or her to become a judge—even without any legal experience or seniority.[75] This is an interesting approach, given the significance of the dispute resolver's experience and reputation when establishing authority in the eyes of the parties involved. The clerical perception of the inquisitorial judges harms their ability to demonstrate experience and skill beyond their judicial role, crucial elements in guiding parties towards settlement, while using dispute resolution practices.

Within the inquisitorial tradition, rules of procedure are strict and are managed mostly by the judge.[76] The trial at first instance, where the factual basis of the case is determined, is managed as a series of performances before the judge, without any clear distinction between the preliminary and evidentiary

22–23. Rather, this system is characterized by a legislative fabric in which there are lacunas and gaps, required for disruption and judicial supplementation *Id.* at 14.

[70] For further details on the development of the continental tradition, see MERRYMAN & PEREZ-PERDOMO, *supra* note 2, at 6–38.

[71] *Id.*

[72] *Id.* at 36–38.

[73] *Id*. at 20–27, 34–39.

[74] This is in contrast to electing a judge from a line of experienced lawyers or esteemed scholars in common law countries. Chase & Varano, *supra* note 60, at 215, 217; MERRYMAN & PEREZ-PERDOMO, *supra* note 2, at 33–35.

[75] MERRYMAN & PEREZ-PERDOMO, *supra* note 2, at 35. In France, for example, the appointment of a judge is conditional on studies at a special judges' school after completing a law degree. *Id*.

[76] *See* Chase & Varano, *supra* note 60, at 220–26; LEVIN, *supra* note 60, at 121–33.

stages. The discovery is very basic and limited, led by the principle that no party should be required to assist the other party in the investigation of facts. The status of written evidence is stronger than that of oral testimony; investigation of witnesses is conducted mostly by judges, without cross-examination by lawyers; and the choice of witnesses is also made by the judge. The authority given to the professional judge to take active measures along the way is, therefore, far more substantial than that afforded to the adversarial judge.

The inquisitorial process is characterized by protocols based on written requests. This replaces oral argument, which is prevalent in the adversarial process, and allows the judge to directly converse with the parties. The inquisitorial judge, however, rarely sees the parties. Thus, her ability to develop an alternative type of discourse during preliminary procedures is limited. This typical lack of direct interaction with the litigants during preliminary stages of litigation, and in general, is yet another obstacle to the ability of the inquisitorial judge to resolve the case at hand.[77]

Thus, at first glance, it seems that the common and continental traditions are mutually exclusive. However, this assumption of dichotomy between these two seemingly distinct traditions is nowadays debatable. In the following section, this Article will examine a hybridization process we identify today in numerous legal systems worldwide, specifically, the integration of inquisitorial apparatuses within adversarial mechanisms.

III. THE INTEGRATION OF INQUISITORIAL TOOLS WITHIN THE REALM OF DISCRETION OF THE ADVERSARIAL JUDGE—HYBRIDIZATION

The traditional perceived dichotomy between the adversarial and inquisitorial legal traditions no longer exists as such. Today, legal systems in each country combine—in different degrees and manners—elements of the common law and adversarial procedures with elements taken from inquisitorial judging and codification.[78] This hybridization has become a central characteristic of legal systems and provides various foundations for conflict-resolution processes led by judges, whether on their own initiative or as part of an organizational, institutional structuring that reflects the goals of each court

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[77] Loïc Cadiet, *Civil Justice Reform: Access, Cost, and Delay. The French Perspective*, *in* CIVIL JUSTICE IN CRISIS, *supra* note 32, at 29, § 3.4 at 300 (referring to the law that is applied in France, Cadiet finds that while this system is characterized by the ability to argue orally and publicly, in practice, most courts suffice with written arguments and judges tend to downplay the value of the oral argument to the point of making it a rare practice).

[78] *See* Jolowicz, *supra* note 35, at 281, 288; Menachem Mautner, *Codex shel Hamishpat Hamekubal* [*A Common Law Code*], 36 MISHPATIM 199 (2006) (Isr.); LEVIN, *supra* note 60, at 121–33.

system.[79] This combination of characteristics from both systems, which developed in a patchwork way, was created to achieve efficiency as well as other institutional goals, as ADR processes have been implemented into the different courts. Some of these procedures have been developed bottom-up, at times accompanied by legislation and legal reforms enacted top-down, with little conceptualization and theorization of these developments.[80]

Indeed, in examining adversarial legal systems, we are not dealing with a unified model. While civil litigation in the U.K. is extremely expensive,[81] the American court system is more open and diverse. The American system is accessible to broader parts of the public. Yet, American litigation is also expensive and cumbersome due to its extensive discovery requirements.[82] Similarly, there are distinct differences between the different legal systems found in civil law countries.[83] Yet, despite the clear structural and ideological differences between the two traditions, over the past few decades in countries representing both traditions, there has been an ongoing process of studying and applying norms and techniques typical of the other system. This implementation has been conducted partly through "legal transplants,"[84] and partly

[79] Thus, for example, the imposition of a financial sanction on a party who refuses a settlement proposal during the proceeding, where the result in the judgment is worse than the proposal he received. This system, used in the United States, England, and Ireland encourages the parties to negotiate with each other in such a way that the proposing party actually buys a kind of "insurance policy" in case his proposal, which was not accepted, is higher than the judicial proposal. In such a case, the refusing party will be fined since his refusal resulted in the conduct of an entire legal proceeding without lessening the system's workload. *See* Pablo Cortés, *A Comparative Review of Offers to Settle—Would an Emerging Settlement Culture Pave the Way for their Adoption in Continental Europe?*, 32 CIV. JUST. Q. 42, 43–47 (2012). This practice makes the court an active participant, even if not a direct one, in the conduct of reaching a settlement, and the judge herself holds the sword of the financial sanction in view of the judicial outcome and the mediation proposal with respect thereto, *id*. at 45. The same applies to Israel, where §§ 504–10, Old Civil Procedure Regulations, *supra* note 17, allow a judge to impose costs in cases such as these. The New Civil Procedure Regulations cancelled these regulations and therefore impair the ability of the active judge to use the tool of imposing costs in order to promote a settlement. *See* Alon Klement, *Reforma Behotsaot Mishpat Bahalich Haerzrahi – Mitve Lediun* [*Reform of Trial Costs in Civil Procedure – An Outline for Discussion*], 9 MISHPATIM AL ATAR 107, 139–40 (2016) (Isr.).

[80] *See, e.g.*, WOOLF, *supra* note 33, at 272–81. *See also* Resnik, *supra* note 7.

[81] ADRIAN ZUCKERMAN, ZUCKERMAN ON CIVIL PROCEDURE: PRINCIPLES OF PRACTICE 773–74 (3d ed. 2013).

[82] *See* Kotz, *supra* note 50; Lee, *supra* note 33.

[83] Chase & Varano, *supra* note 60, at 215, 217; MERRYMAN & PEREZ-PERDOMO, *supra* note 2, at 33–35. *See generally* CIVIL JUSTICE IN CRISIS, *supra* note 32 (examining practices of each of the countries that operate under this tradition and characterizing the differences between them).

[84] ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 21–30 (2d ed. 1993).

through gradual processes of adaptation and merging. This implementation is linked to the critique concerning the pitfalls typical to each tradition, and conversely, the advantages inherent to the other tradition.[85]

This process originated at the end of the nineteenth century with the development of comparative study of the procedures and conflict-resolution mechanisms of each system.[86] For example, continental countries began to establish constitutional courts with the goal of confining the power of the legislature while expanding the power of judges. They did so by granting the judicial branch authority and wide discretion to declare a law unconstitutional and subsequently invalidate it.[87]

Another example is the establishment of supranational bodies in Europe, such as the European Union, which created norms and rules that subjugated the rules of all countries that belong to it.[88] This created multiplicity of legal systems in the same country, similar to the situation in common law countries.[89] Moreover, continental judges began to rely on legal precedent, such as the decision that the rulings of the Constitutional Court in Germany bind other German courts.[90]

Simultaneously, throughout the twentieth century, a critical discourse began to develop concerning the efficiency of the adversarial system and the role of judges within it.[91] While changes to the *Code civil* systems have always

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[85] One of the methods of assimilation is to hold conferences and joint learning sessions of judges from the various legal systems, which focus on dialogues that deal with judicial settlement as a cross-border practice. Thus, for example, the European Council hosted the 1st European Conference of Judges in 2003, which dealt with possibilities available to the judge to assist the parties in reaching an early settlement of the dispute. In addition to judges from European Council member states, judges from the United States, Canada, and other countries took part. 1st Eur. Conf. of Judges, *The Early Settlement of Disputes and the Role of Judges* (June 2005).

[86] Chase & Varano, *supra* note 60, at 215, 217; MERRYMAN & PEREZ-PERDOMO, *supra* note 2, at 33–35.

[87] GLENDON ET AL., *supra* note 55, at 88–120.

[88] *See* Consolidated Version of the Treaty on the Functioning of the European Union, May 9, 2008, 2008 O.J. (C 115) 47. European institutions can create directives, regulations, decisions, opinions and recommendations, where the regulations are a matter of legislation, with a general and direct applicability to any member State. *Id.* at arts. 288–89. Also, the principle of subsidiarity allows the Union to enact a law in cases where a particular goal is not properly achieved by the member States. Consolidated Version of the Treaty on European Union art. 5(3), Dec. 13, 2007, 2012 O.J. (C 326) 13.

[89] Thus, in several countries in Europe, domestic and EU law will apply. Dana Burchardt, *The Relationship Between the Law of the European Union and the Law of its Member States - A Norm-Based Conceptual Framework*, 15 EUR. CONST. L. REV. 73, 83–84, 87–88, 93 n.63, 97–98 (2019).

[90] GLENDON ET AL., *supra* note 55, at 106; John Bell, *Comparing Precedent*, 82 CORNELL L. REV. 1243, 1248 (1997) (book review).

[91] Chase & Varano, *supra* note 60, at 220–26; Jolowicz, *supra* note 35, at 286; DÉIRDRE DWYER, THE CIVIL PROCEDURE RULES TEN YEARS ON 1–3 (2009).

been dramatic and characterized by codification produced "out of thin air," the common law traditionally evolved around small and gradual changes rooted in the existing structure.[92] Eventually, and unlike the gradual and linear way in which the principles of common law had originally developed, swift and radical changes began to emerge in flagship countries of the common law tradition, such as England, which have essentially changed the nature of their legal systems. For example, in 1998 with the enactment of the Human Rights Act, British law was subordinated to the European Convention on Human Rights, which represented an internal change that originated in external norms.[93] In addition, the broad social legislation enacted by the English parliament in the nineteenth century bypassed the method of gradual creation of social laws by judges and their rulings. The parliament in effect created legislation anew, similar to the processes of the continental tradition.[94]

The ideological basis of the English legal system underwent dramatic changes with the adoption of the Lord Woolf reform, which transformed the conceptual center of gravity of the system: from justice on the merits at all costs to the inquisitorial ideal of access to justice.[95] This meant, among other implications, that cost became a central consideration in deciding whether or not to litigate a case.[96] The understanding that cost was a central barrier to the ability to end disputes through traditional litigation (culminating in a court ruling) led to an institutional directive to search for alternative procedures for dispute resolution.[97] This conceptual change has had significant organizational and procedural influence on all levels of the English legal system.[98] The Lord Briggs reform diverted the principal stage of litigation to the preliminary phase.[99] Among other means, parliament achieved this reform by introducing

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[92] Allan C. Hutchinson, *Making Progress? Change and the Common Law*, 4 HIBERNIAN L.J. 25, 28, 37–38 (2003).

[93] *See* Human Rights Act 1998, c. 42, § 3(1) (UK) ("So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.").

[94] GLENDON ET AL., *supra* note 55, at 316.

[95] *See* Paul Michalik, *Justice in Crisis: England and Wales*, *in* CIVIL JUSTICE IN CRISIS, *supra* note 32, §§ 4.2–4.3, at 152–58.

[96] *See* WOOLF, *supra* note 33, at 78.

[97] *See* discussion and sources cited *supra* note 33; Alberstein & Zimerman, *supra* note 23, at 303–04.

[98] *See* Jolowicz, *supra* note 35, at 289; Gregory W. O'Reilly, *England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice*, 85 J. CRIM. L. & CRIMINOLOGY 402, 451 (1994) (dealing with the restriction of the defendant's right to silence in criminal law and attributing changes in the law to the application and acceptance of inquisitorial elements).

[99] LORD JUSTICE BRIGGS, CIVIL COURTS STRUCTURE REVIEW: FINAL REPORT (2016), https://www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf.

a computerized system and case managers whose role is to deem the actual opening of the case redundant.

Galanter argues that throughout the second half of the 20th century, the American legal system underwent an institutional shift which conferred broader discretion on trial court judges, especially at pretrial proceedings.[100] This implementation of continental and inquisitorial practices and procedural rules within the American legal system has directly contributed to the reduction of the number of trials, as many lawsuits are decided without evidentiary hearings and based only on written pleadings and evidence submitted to the court.[101]

The paradigmatic shift—the move from classic adversarial procedure to one that incorporates inquisitorial elements—required procedural reforms, mainly in the manner of affording powers once held by the parties alone to the judge, who had become significantly more involved in the management of litigation. This reform was made possible through specific rules that allowed the judge to manage the process, set timeframes, and act of her own initiative without having to rely on the parties' requests.[102] In Israel, where most lawsuits end in settlement (or other ways not through judgment),[103] the combination of common law with the reliance on detailed codes, especially in civil cases, was declared from the outset as inherent to its hybrid nature as a (young) legal system that draws from both traditions.[104] The origins of the

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[100] Marc Galanter, *The Vanishing Trial*: *What the Numbers Tell Us, What They May Mean*, 10 DISP. RESOL. MAG. 3, 5 (2004).

[101] *Id*.

[102] ROSEN-ZVI, *supra* note 21, at 97; §§ 143–47, Old Civil Procedure Regulations, *supra* note 17 (regulating the powers of the judge in pretrial proceedings).

[103] *See* Weinshall-Margel et al., *supra* note 25, at 768; Sela et al., *supra* note 8, at 90–92; Ayelet Sela & Limor Gabay-Egozi, Vanishing Trials, Settlement Judges? Data on Judges' Procedural Involvement Shed Light on Their Role in Civil Litigation 3 (July 25, 2018) (unpublished paper presented at the Annual Meeting of the Israeli Law and Society Association) (on file with authors). *See generally* 1st Eur. Conf. of Judges, *supra* note 85.

[104] *See* Mautner, *supra* note 78; Aharon Barak, *Shitat Hamishpat Beisrael – Masorta Vetarbuta* [*The Legal System in Israel – Its Tradition and Culture*], 40 HAPRAKLIT 197 (1992) (Isr.); Aharon Barak, *Mavo Lehatsa'at Hacodex Haezrachi Haisraeli* [*Introduction Israeli Draft Civil Code*], 36 MISHPATIM 1 (2006) (Isr.). Following the replacement of the Mecelle, Israeli law was based on existing legislation and case law, on the rules of *Mishpat Ivri*, as well as on comparative law and its Anglo-American and Continental sources. Thus, while the prominent part of civil law was formulated in the Supreme Court rulings, the code, borrowed from civil law, completed gaps found therein. *See* Mautner, *supra* note 78, at 210. Mautner reviews three influential codes, including the French Code Civil, in the context of which he notes that despite it being detailed and accessible in its language, the courts in France deal with the creation of a law in a manner identical to the method of action of judges in England and the United States. It is possible that the reason why the code manages to function successfully despite the many societal changes in the centuries since its enactment, is the contribution of the courts to its completion and updating it with new contents. Mautner, *supra* note 78, at 210–13.

Israeli legal tradition (including the influence of Jewish law) draw upon the common law and clear inquisitorial elements.[105] Thus, while most of Israeli law was formed via rulings of the Supreme Court, this was complemented by the codex borrowed from continental law as needed. When examining Israeli rules of civil procedure, the process of pleadings, for example, builds on inquisitorial traditions.[106] Similarly, the rule determines that a party cannot raise alternative factual claims without the use of an affidavit.[107] In addition, the rules of procedure in family court, which require filing an affidavit to substantiate facts that are mentioned in pleadings, attempt to limit the kind of arguments parties can make while focusing on claims that appear to be the ones that can be proven.[108] It seems that these procedural mechanisms were meant to minimize the preliminary gaps that characterize adversarial pleadings by shedding light on the real disagreements—and on real disagreements only—from the outset. This is a significant departure from a tradition that made it possible, for the sake of establishing a preliminary rights discourse, to extend the dispute between the parties well beyond their actual interests. The incorporation of focused and purposeful rules of civil procedure has limited the extent of disagreement that comes before the judge from the start. This enables the judge to decide upon the actual discrepancies between the parties while focusing her efforts on leading them to settle the case, taking into consideration the wider web of their interests.[109]

This Article will next examine the hybridization of legal traditions in general and, in particular, the assimilation of tools that are typical to the inquisitorial tradition within adversarial systems. Delineating new patterns that have emerged will facilitate the actual application of unique ADR procedures within the courtroom.

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[105] Orna Rabinovich-Einy & Doron Dorfman, *Shimush Lera'a Vechoser Tom-Lev Bahalich Haezrachi: Hapa'ar Shebein Model Diuni Post Adversary Lemodel Yetsug Masorati* [*Abuse and Bad Faith in the Civil Procedure: The Gap Between a Post-Adversarial Procedural Model and a Traditional Representation Model*], *in* THE BOOK OF SHLOMO LEVIN 255, 264–65 (2013). Former Justice Levin determines that there are currently no more pure models according to one of the above systems. *See* LEVIN, *supra* note 60, at 121. The New Civil Procedure Regulations create a perception of an inquisitorial judge who conducts the judicial proceeding proactively. *See* Gal, *supra* note 34, at 2.

[106] Tit. A, §§ 240–46, Old Civil Procedure Regulations, *supra* note 17.

[107] *Id*. § 72(b).

[108] *Id*. § 258(H). This is similar to the requirement to file an affidavit in summary civil claims. *Id*. §§ 214(C), 79.

[109] *See* Gal, *supra* note 34, at 2.

IV. CONFLICT RESOLUTION PROCEDURES IN THE ADVERSARIAL SYSTEM

A. From the Inside Out and Back Again

Dispute-resolution procedures offered by the ADR movement were developed outside of the legal system in response to the limitations and disadvantages of the adversarial system. The question is: do these procedures maintain their advantages when implemented back into traditional courtroom settings?[110] In this section, this Article presents the development of a new sphere of judicial activity as part of the evolution of current mediation practices—from an *alternative* to adjudication to a *hybrid* process that combines authority with persuasion, one that is parallel to the contemporary judicial activity of reaching agreements within the courtroom.[111]

The institutional need to shift legal disputes to external dispute-resolution forums emerged from the significant caseload in legal systems, which caused significant delays in the time needed for cases to be resolved as well as the high costs involved in managing full litigation.[112] These factors led to two constitutive events that shaped the conflict-resolution ideology in common law countries. The first was the Pound Conference, convened in Minnesota in 1976, where leading American legal scholars gathered to express their disappointment in the administration of justice in the legal system of the time.[113] The second was the publication of Fisher and Ury's book *Getting to Yes* in 1981.[114] The book offered a new perspective on how conflicts are handled, suggesting an alternative way of thinking about conflicts and their resolution.[115] In other words, the search for alternatives outside of the formal legal

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[110] Some believe that the ability of the judge to mediate in the courtroom is limited and is mainly based on his skill in assessing the legal risk inherent for each party in the case. The judge, according to this theory, is not sufficiently skilled and lacks the appropriate tools to develop a broader discourse of interests, and as a result, the outcome achieved in this type of mediation does not end the wide-ranging dispute between the parties, but only the dispute before the court. Mironi, *supra* note 14, at 499; Elad Finkelstein, *Hafrata Veregulatsia: Hahasdara Hamishpatit shel Halich Hagishur* [*Privatization and Regulation: The Legal Regime Governing Mediation*], 30 IYUNEI MISHPAT 623, 650 (2008) (Isr.); Joyce Low & Dorcas Quek, *An Overview of Court Mediation in the State Courts of Singapore, in* MEDIATION IN SINGAPORE: A PRACTICAL GUIDE 203, 240–41 (2015).

[111] For a description of this move from the perspective of the development of models of mediation and for a detailed presentation of the hybrid model of authority-based mediation, see Amos Gabrieli et al., *Authority-Based Mediation*, 20 CARDOZO J. CONFLICT RESOL. 1 (2018).

[112] *See* Gal, *supra* note 34; Alberstein & Zimerman, *supra* note 23, at 303–04.

[113] J. Clifford Wallace, *Judicial Reform and the Pound Conference of 1976*, 80 MICH. L. REV. 592 (1982).

[114] ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Bruce Patton ed., 1981).

[115] *Id*. at 10–14; ALBERSTEIN, THEORY OF MEDIATION, *supra* note 35, at 170–71, 238.

system was driven by the system's failures and reservations felt by both litigants and experts within the system towards the adversarial tradition in various countries.[116]

Given these two key events, one could argue that the reason behind the development of conflict-resolution procedures within adversarial systems was not inefficiency, as perceived during the Pound Conference, since ADR is not necessarily a more efficient mechanism for dispute resolution. Rather, mediation was perhaps promoted and adopted as a procedure that provides the opportunity—according to its founders, and in the spirit of Fisher and Ury—to reach a wholesome, complete, broader, and more just solution to disputes.[117] The preference of dispute-resolution procedures over adversarial litigation stems partially, therefore, from the recognition of the system itself that it should not only serve merely as an indifferent technical mechanism for determining cases; instead, the legal system can aspire to provide a holistic and broad approach to the resolution of disputes, not limited to the narrow context at hand.[118]

The coupling of pragmatic mediation as a holistic alternative and the adversarial system could be understood based on the claim that the adversarial procedure was designed in the first place for the purpose of dispute resolution and not driven by the search for truth.[119] According to this view, the adversarial system is, apparently, friendlier and more suitable for the assimilation of dispute-resolution processes, both within and outside the courtroom. This is because a legal procedure whose purpose is not the achievement of justice or compatibility between factual and legal truths is more suitable for the parties to reach an agreement.[120] Mediation, it would appear, offers a better solution

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[116] Cortés, *supra* note 79, at 42. Cortés's point of departure is that the combination of high legal costs and an evolving culture of judicial mediation was formed mainly in the common law countries, where these two components were fundamental tiers of the method itself: "In common law jurisdictions settlement is perceived to be the best possible outcome of a dispute, where the recourse to the civil courts often represents not only a more costly and time-consuming option, but also 'the failure of a social, commercial or public relations and mechanisms.'" *Id*.

[117] *See* Michal Alberstein, *Tsedek Mair Mol Tsedel Nisgav: Anatomia Shel Iachasei Praktika Vetheoryia Beyeshuv Sichsuchim* [*Swift Justice Versus Sublime Justice: Anatomy of Practice and Theory Relations in Dispute Resolution*], 9 ALEY MISHPAT 85 (2011) (Isr.); Alberstein, THE THEORY OF MEDIATION, *supra* note 35, at 25–38.

[118] Jolowicz, *supra* note 35, at 286.

[119] *Id*. at 288.

[120] Mordechai Kremnitzer, *Hatamat Hahalich Haplili Lematara shel Gilui Haemet o Haim Lo Hegia Haet Lesaiem et Onat Hamischakim* [*Adapting the Criminal Procedure to the Purpose of Discovering the Truth, or Is It Not Time to End the Games Season*], 17 MISHPATIM 475, 477–78 (1988) (Isr.) ("The distinguishing feature of the system known as 'inquisitorial' is the duty to investigate, which is imposed on the judge. The court investigates, by virtue of its role, the factual data, in the words of Section 244.2 of the German Code of Criminal Procedure – the truth (without quotation marks).").

for conflict resolution, with the added value of providing a broader framework relating to conflicts.

Yet, despite the apparent compatibility between adversarial conflict resolution and its extra-legal alternatives, the nature of oppositional litigation, which is traditionally managed by the parties and their attorneys while relying upon tendentious pleading revealing only partial truths,[121] clearly offers little ground for open and peaceful discourse between the parties. The pleadings, which frame any legal conflict from the outset, routinely initially reflect unlimited aspirations of the parties, which present to the court unrelenting positions that do not include or reflect any interests that cannot be directly translated into legal arguments or remedy. The parties have maintained language, even in the era of ADR, that is oppositional, defying, lacking any acceptance of the other side's claims, and which relies on rights discourse only. This climate poses an inherent challenge to the introduction of a cooperative discourse between the parties themselves, one that incorporates the examination of broad interests, and even extra-legal ones.

The nature of pleadings within the adversarial tradition is a result of an ongoing legal culture within which the attorney envisions the most effective way to persuade the judge to rule in their client's favor, regardless of how the facts were presented to them, and mainly based on the impact of the presentation on the other party.[122] This contributes to deepening and escalating the conflict between the parties, since pleadings are perceived as a rhetorical tool in the exchange between the lawyers and the judge, rather than as a means of communication through which the parties may reach an understanding.[123]

Even when the pleadings are, allegedly, based on empirical and proportional presentation of the claims, such as when an expert opinion that is meant to bring before the court scientific or other professional truth is presented, they are still contaminated by a subjective narrative and a confrontational nature. Appointed experts tend to overlook scientific possibilities and probabilities that do not keep with the position of the party who enlisted their services,

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[121] Pinchas Goldstein & Moshe Burnovsky, *Hibatim Eyonieim Shel Kedam Misphat* [*Some Aspects of the Pre-Trial Conference ("Kedam Mishpat") in Israel*], 4 IYUNEI MISHPAT 312, 322 n.36 (1975) (Isr.).

[122] ROSEN-ZVI, *supra* note 21, at 97.

[123] Perlman, *supra* note 14, at 371–72 ("The adversarial system, fosters unnecessary strife, radicalizes positions and creates arguments that do not focus on achieving an effective solution to the dispute. The adversarial proceeding makes legal representation belligerent in its nature, and leads to threats, concealment of important information and a presentation of a partial and erroneous picture of the dispute, which does not take into account a complex human reality. It is argued that the adversarial conduct harms the psychological well-being of all parties to the dispute and that the adversarial practice handles the problem on a narrow level and provides a forced solution which is often merely ad hoc and superficial.").

while highlighting less likely or negligible possibilities in the interest of the party they serve.[124]

This state of affairs illustrates how the failure of the adversarial system to create and encourage narrow or broad conciliative discourse between the parties has continued to overshadow the possibility of forming meaningful mediation procedures under the auspices of the court.[125] Sander, as a founder of the ADR movement, originally envisioned transforming courts into dispute-resolution centers, where parties would arrive to tell their stories prior to submitting their pleadings.[126] According to his approach, first would come a functional sorting procedure, where the parties' goals and the pitfalls characterizing their dispute would be identified. Then, the procedure would be tailored to the needs the parties present and the barriers preventing them from reaching an agreement on their own. According to Sander, only in rare cases where adjudication is indeed selected as the appropriate avenue would the parties submit their pleading and continue to traditional litigation.[127] Adjudication, it follows, would be a rare occurrence. This vision was never realized. The court system supported the evolution of alternative procedures on the one hand, while, on the other hand, maintaining the adversarial nature of the court and positioning mediation as less worthy than litigation. Today's mediation, conducted alongside legal procedures, is mainly characterized by an authoritative approach focusing on resolution in a narrow sense.[128]

It can be argued that the promise of the ADR movement eventually led to alternatives that are closer to traditional adjudication than what its founders had envisioned. The development of meaningful mediational discourse alongside the legal system has been met with limited success.[129] The ideology of mediation has managed to permeate the courtroom only to a very limited degree. The adversarial system, which could have largely benefitted from a

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[124] ROSEN-ZVI, *supra* note 21, at 162 ("It is universally known that in the adversarial system, experts are 'hired guns' . . . reality shows that in exchange for the appropriate fee, there will be found an expert who is willing to say anything. Paradoxically, in the current situation, the more impartial and objective the expert the less likely he is to be hired by the litigant.").

[125] The typical narrative is that a pleading aims to persuade the deciding third party, whereas the narrative of a party to an alternative dispute resolution proceeding is attempting to persuade the opposing party.

[126] *See* Frank E. A. Sander, *The Multi-Door Courthouse: Settling Dispute in the Year 2000*, 3 BARRISTER 18, 20 (1976). *See also* Sander & Rozdeiczer, *supra* note 35.

[127] Sander & Rozdeiczer, *supra* note 35, at 23.

[128] *See* Michal Alberstein, *Al Hachipazon Vehatsedek Haprotsedurali Bebeit Hadin Leavoda: Tatzpiot Begishur Veshfita* [*Of Haste and Procedural Justice in the Labor Court: Observations of Mediation and Adjudication*], 7 MOZNEI MISHPAT 119, 137 (2010) (Isr.); Gabrieli et al., *supra* note 111, at 5–8.

[129] KARNI PERLMAN, YISHUV SICHSUCHIM – MISHPAT SHITUFI VETIPULI [CONFLICT RESOLUTION – APPLYING NON-ADVERSARIAL AND THERAPEUTIC JUSTICE] 145, 165 (2015) (Isr.); Gabrieli et al., *supra* note 111, at 9.

wider dispute resolution perspective, has developed tools suitable for the existing competitive arena in order to promote agreement and cooperation while still maintaining its traditional characteristics. These tools have given rise to common practices of bringing about agreement driven by judicial authority.[130]

Widespread dispute resolution practice incorporated within an adversarial legal system is more effective when there is a legislative and organizational foundation that accords with this philosophy, where clear inquisitorial-like tools have been incorporated into the legal system. These tools differ from those used in mediation and should be closely examined, yet their incorporation within the formal legal system contributes to the mediational discourse and increases the chances of ending cases in settlement. The value of such tools is in adding elements of truth-seeking and judicial activism to a system that has traditionally focused on narrow dispute resolution overborne by a passive judge. Contextualizing such tools in a worldview of dispute resolution enriches judicial activity, forming a liminal space between mediation and adjudication.

Our claim is that the manner in which the adversarial judge perceives her own role and authority,[131] combined with inquisitorial influences as described above, creates a new dynamic relative to that found in the traditional adversarial stance. The change in judges' self-perception[132] and the exposure to other forms of dialogue—dialogues that put the person, and not the dispute, at the center, and that involve interests and feelings, not only rights—in effect also transform the way in which the parties and their attorneys perceive the role of the judge.

This hybridization allows for the application of techniques typical to dispute-resolution procedures within the adversarial legal system and reflects its readiness for the inclusion of such procedures as a result of (but not limited to) the changing role of the judge.[133] This assimilation relies on two

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[130] Alberstein, *supra* note 8.

[131] For example, the judicial mediation practiced by all of Singapore's judicial instances, where the mediating judge follows specific regulations, but will under no circumstances will be involved in any subsequent trial processes. *Mediation*, SINGAPORE COURTS: THE JUDICIARY (Aug. 3, 2022) (Sing.), https://www.judiciary.gov.sg/alternatives-to-trial/mediation/going-for-mediation-state-courts; Jean-François Roberge & Dorcas Quek Anderson, *Judicial Mediation: From Debates to Renewal*, 19 CARDOZO J. CONFLICT RESOL. 613, 618 (2018).

[132] With respect to the development of the perception of the traditional role of the federal judge in the United States and expansion of the permissible toolkit that may be used, see Judith Resnik, *Uncle Sam Modernizes His Justice: Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 651–55 (2002).

[133] On the extent to which intervention by the adversarial judge in the proceeding over which he presides has changed from passive to active, see *id.* at 654 ("Federal judicial hierarchy is pushing a campaign to make its trial judges abandon their traditional role as

foundations. The first is the ideological and organizational cooperation between the legal system and external dispute-resolution facilitators (in particular, mediators). This cooperation allows judges, according to the rules of procedure and additional legislation concerning judicial discretion, to work with the facilitators and even to impose sanctions on a party that does not cooperate with mediation. This cooperation also allows judges to approve, later on in the process, external settlements that are brought before the court. The second foundation examined in this paper comprises activities performed by judges within the courtroom, aimed at settling the case by means other than judicial ruling.

The preliminary stage, through which judges familiarize themselves as spectators of varying dispute-resolution techniques employed in settlements reached by external professionals and brought before them, may serve as a basis for the familiarity required for the second stage. At this stage, judges act on their own, according to their individual capabilities, in applying these very same techniques within the courtroom.[134] The significant exposure of both lawyers and judges to various dispute-resolution practices, including through training, promotes the formation of the expertise and openness needed for the educated use of such techniques during legal procedures within the courtroom.

How then have models of negotiation bearing mediational characteristics, which were designed to bring parties to reach an agreement, come to be within the adversarial courtroom in practice? To answer this question, this Article will turn to examine preeminent common law systems in three different countries: the United States, Israel, and England. Each legal system allows us to analyze the introduction of inquisitorial tools to adversarial courts from different vantage points, each shedding light on different aspects and possibilities this phenomenon bears with it. This Article will start its examination by looking closely at mediational characteristics within American courtrooms, and the way they were shaped by rules of procedure. After that, this Article will continue with a comparison of the American and Israeli systems, tracking recent major developments of the Israeli rules of civil procedure. Finally, this Article will finish with the country which was the birthplace of the common law system—England—and will see what changes this allegedly-rigid system underwent through the years in the direction of conflict-resolution tools within the court.

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passive umpires between opposing lawyers and to become more masterful in controlling trials.").

[134] Dispute resolution proceedings have transformed from external procedures, which neither address nor incorporate legal considerations, into an integral part of the judicial process. *See id.* at 655 & n.211.

B. The New Judicial Sphere in the American Legal System

The American legal system was a pioneer in assimilating inquisitorial techniques, following years of developing the practice of external, alternative dispute-resolution procedures.[135] Alongside the ongoing public debate regarding the identity of judges, how they are appointed, and for how long, the discourse broadened to include questions concerning the changing role of federal judges and how the judges themselves perceive their role. Subsequently, the perceptions of litigants themselves began to change, including their degree of tolerance towards the evolving scope of judges' powers[136]: first, with the setting of discovery and conflict-resolution procedures that were managed by pretrial examiners who are not judges; continuing with the appointment of magistrates whose task is to absolve judges of the need to deal with extra-judicial matters so that they can focus on issuing judgments; and finally, with the regulation of new rules, gradually introduced from the 1950s on, that allowed judges to carry out these same actions on their own.[137]

Subsequently, the settlement conference procedure evolved to where the judge initiates the conference but does not herself serve as mediator. Rather, a few days prior to the beginning of trial, the parties must attend a settlement discussion. The judge is authorized to compel the parties to be present and to bring any litigant who is authorized to make a decision concerning settlement on site.[138] A party who failed to bring the authorized individual was subject to sanctions bearing significant costs.[139] Eventually, various states began instilling mandatory mediation within courts, either initiated by the judge or mandated by the court system,[140] within the framework of relevant legislation.

The reform in the Federal Rules of Civil Procedure,[141] which were assimilated within the legislation of dozens of states,[142] significantly broadened the ability of American judges to intervene in the preliminary stages of

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[135] For more on the history of the development of ADR in the United States, see Holly A. Streeter-Schaefer, *A Look at Court Mandated Civil Mediation*, 49 DRAKE L. REV. 367, 369–71 (2001).

[136] Resnik, *supra* note 132, at 651–55.

[137] *Id*. at 649–51. The change began in the 1950s, and the first cases in which such procedures were implemented concerned bodily harm. *See* Resnik, *supra* note 14.

[138] Elliot G. Hicks, *Too Much of a Good Thing?*, 12 W. VA. LAW. 4 (1998).

[139] G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 650–53 (7th Cir. 1989).

[140] *See, e.g.*, Chris Stirewalt, *Mediators Help Many Find Middle Ground*, CHARLESTON DAILY MAIL, June 1, 1999, at 1C (describing the situation in West Virginia, where in 1986 a Federal Judge initiated a unique mediation program, which only a decade later was formalized as a mandatory mediation procedure in the entire State).

[141] For a discussion on the reform, see Yeazell, *supra* note 23.

[142] John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1377 (1986).

litigation.[143] Accordingly, they created a convenient platform for ending litigation either through settlement or withdrawal at the early stages of the legal process.[144] Judicial decisions given during preliminary procedures helped parties reevaluate their desire to reach a settlement and allowed them, at a relatively early stage, to predict the possible outcome of the case. By doing so, the new rules of civil procedure have transformed litigation from a search for truth to an efficient and exhaustive investigation of legal procedure. Discovery, which was elaborated under the new rules, made way for judicial intervention in cases where the parties failed to reach an agreement,[145] and these judicial interventions incentivized parties to either reach a settlement or withdraw their lawsuit.[146] Judges in lower courts enjoyed almost full immunity from any critique by appellate courts concerning their discovery decisions.[147] A document revealed following a judicial decision at an early stage of the process could lead a party who recognizes that the other party holds significant evidence to reach a compromise, relinquish some of their arguments, or even withdraw the lawsuit altogether. This is the kind of legal prediction that encourages parties to reach a settlement.

Another change introduced in the new rules, which provided a clearly inquisitorial tool, was the option to bring into the case any party that is perceived as relevant to the legal process. The only requirement is that this new party must be related by a common question of fact or law.[148] This differs from the previous situation in the American adversarial system where the joinder of parties or claims was allowed only in very limited situations.[149] For example, joinder of parties is now allowed when the new party is related to an action or an event that is the subject of a lawsuit.[150] Rule 19 allows adding or removing parties under certain circumstances,[151] and Rule 23 elaborates the definition of instances where it is possible to join a class action.[152] There is evidence showing that enlarging the ability to join parties and combine claims has incentivized parties to reach settlements or to withdraw lawsuits and has served

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[143] Yeazell, *supra* note 23, at 636, 637 n.18. *See* Resnik, *supra* note 7, at 404–05, 408 n.137.

[144] Yeazell, *supra* note 23, at 656–60.

[145] According to an earlier version of the Code, a party seeking discovery of a document was required to show "good cause therefor." FED. R. CIV. P. 34 (1968) (amended 1970). The amendment omitted this requirement, and currently only relevance is required. FED. R. CIV. P. 26(b)(1).

[146] Yeazell, *supra* note 23, at 648–50.

[147] *Id*. at 650–53. The appellate court will only intervene in rare circumstances, and where the judge clearly exceeded the discretion vested in her on such matter. *Id*.

[148] FED. R. CIV. P. 20.

[149] Yeazell, *supra* note 23, at 654.

[150] FED. R. CIV. P. 13, 14.

[151] FED. R. CIV. P. 19.

[152] FED. R. CIV. P. 23.

as a significant cause in reducing the number of cases ending without a judicial ruling.[153]

The American pretrial process affords judges the ability to consider any method or avenue that may promote the progress of the case. The ground for this is that judges are granted responsibilities that deviate from their traditional role through the elaboration of judges' discretion concerning the management of the process.[154] Rule 16 of the Federal Rules of Civil Procedure (originally called "Pre-Trial Procedure; Formulating Issues"), which initially vested discretion in judges to confer with lawyers on trial preparation, gradually became what Resnik has referred to as "the centerpiece of judicial management of both lawyers and of cases, and the aim is avowedly to promote settlement without trial."[155] This could be demonstrated in the evolving interpretation given to the Rule by different courts over the years. While in 1945, the Ninth Circuit Court stated that "the purpose of the pre-trial conference is to simplify the issues, amend the pleadings where necessary, and to avoid unnecessary proof of facts at the trial;"[156] by 2012, the District Court for D.C. interpreted the Rule's purpose as "to promote the ability of the Court to manage cases, to develop 'a sound plan to govern the particular case from start to finish.'"[157]

Within this framework, the judge may invite the parties' attorneys to attend an informal hearing to promote a settlement even before the formal procedure actually begins.[158] The regulation of this procedure through legislation has granted it special status, so that a pretrial conference is now seen as an "integral part of procedure."[159] This special status stems from the position Rule 16 has acquired over the years, placing it at the heart of the legal procedure; with the inquisitorial tools it provides regarded as a supplement, or even an alternative, to litigation.[160] This is not an incidental attempt to bring parties to

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[153] Yeazell, *supra* note 23, at 653–57.

[154] Harry M. Fisher, *Judicial Mediation: How it Works Through Pre-Trial Conference*, 10 U. CHI. L. REV. 453, 453 (1943).

[155] Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PENN. L. REV. 1793, 1803 (2014).

[156] McDonald v. Bowles, 152 F.2d 741, 742–43 (1945).

[157] Act Now to Stop War & End Racism Coal. v. D.C., 286 F.R.D. 117, 129 (2012).

[158] FED. R. CIV. P. 16.

[159] Fisher, *supra* note 154, at 453–54 (describing the success of Illinois' implementation of mandatory pretrial conferences).

[160] Resnik, *supra* note 155, at 1803–04; FED. R. CIV. P. 16(a) advisory committee's note to 1983 amendment ("settlement should be facilitated at as early a stage of the litigation as possible."). Resnik notes that the federal judiciary website in 2014 emphasized the idea that "[t]o avoid the expense and delay of having a trial, judges encourage litigants to try to reach an agreement resolving their dispute." Resnik, *supra* note 155, at 1806 (quoting *Civil Cases*, ADMIN. OFF. OF THE U.S. COURTS, https://www.uscourts.gov/about-federal-courts/types-cases/civil-cases).

settle, but rather an intentional procedure designed, among other objectives, to make possible a different kind of discourse within the courtroom.[161]

The application of this rule has been expanded to other realms of adjudication, such as allowing judges to strike out a lawsuit when the parties refuse to attend the preliminary hearing.[162] The preliminary hearing is a highly inquisitorial-like procedure that grants judges vast authority of intervention, which can foster a relaxed, informal environment that incorporates ADR tools to create open and all-encompassing discourse. Such discourse is not limited to what is written in the pleadings; it relates to interests and examines solutions outside of the remedies requested by the parties.[163] This procedure allows the judge to reflect to the parties the different legal possibilities that are open to them, to speak directly with the parties themselves, and to reach conclusions that do not necessarily follow from the legal deduction of the evidence that would be required within the realms of a judicial ruling. This

[161] The Rule now encourages direct discourse. One of the latest amendments to Rule 16, in 2015, omitted the provision for consulting a conference by "telephone, mail, or other means," because a conference "is more effective if the court and parties engage in direct simultaneous communication. The conference may be held in person, by telephone, or by more sophisticated electronic means." FED. R. CIV. P. 16 advisory committee's note to 2015 amendment.

[162] *See* FED. R. CIV. P. 16(f)(1) (giving judges authority to impose sanction of dismissal for failure to attend pretrial hearing). For more on the active and intervening judge in adversarial law countries, see OSCAR CHASE ET AL., CIVIL LITIGATION IN COMPARATIVE CONTEXT 254–56, 593–94 (Oscar Chase & Helen Hershkoff eds., 2007). There is no consistent position with respect to the identity of the mediating judge, and whereas some legal systems allow the judge presiding over the case to conduct mediation proceedings, other systems categorically prohibit this. In the United States, the amendment to Rule 16 of the Federal Rules of Civil Procedure, which took effect in 1983, established the judge's power at pretrial to promote a settlement between the parties to the case. FED. R. CIV. P. 16(a)(5). *See also* Sela et al., *supra* note 8, at 13; Roselle L. Wissler, *Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences*, 26 OHIO ST. J. ON DISP. RESOL. 271, 272–73 (2011). At the pretrial stage in Israel, as noted above, the judge has the power to promote a settlement between the parties. § 140, Old Civil Procedure Regulations, *supra* note 17. Observations of pretrial hearings in Israel indicate that judges take a variety of measures for the purpose of persuasion and intervention, which are intended to lead the parties to settle the case. *See* Alberstein & Zimerman, *supra* note 23, at 306; *see also* sources cited *supra* note 14; Alberstein, *supra* note 6, at 47–50.

[163] In Israeli law, the principle whereby the court will not award the plaintiff a remedy that was not sought is not an absolute rule, and may be set aside in unusual cases where three cumulative conditions are satisfied: where the need to clarify the substantive issues in dispute warrants the issuance of the remedy, where the remedy concerned directly derives from the remedy sought, and where all of the evidence required in order to rule on the remedy in question have been provided. *See* CivA 10576/06 Bezeq Benleomi Be'am Neged Tadiran Be'am [Bezeq Int'l Ltd. v. Tadiran Ltd.], Nevo Legal Database (Aug. 12, 2009) (Isr.); CivA 8570/09 Haguli Neged Eiriat Rishon Lezion [Samira Haguli v. Mun. of Rishon LeZion], Nevo Legal Database (Mar. 15, 2011) (Isr.).

platform has provided a fertile ground for conflict-resolution procedures in general, and specifically for mediation.[164]

Another example of the implementation of inquisitorial-like technique within the American legal procedure is summary judgment;[165] the court can conduct an abbreviated procedure in civil cases where there is no factual disagreement and the court can reach an unequivocal ruling through application of relevant law.[166] That way, the judge can review the case and examine it even before litigation has begun, as soon as the end of discovery procedures, and when all relevant documents required for the understanding of the conflict have been revealed. Studies show that this procedure—and the subsequent expansion of judicial discretion in using it—has advanced conflict-resolution procedures and has significantly diminished the number of cases ending through full trial and judgment.[167]

In the absence of empirical data concerning the role of the judge as a promoter of conflict resolution during the litigation process, there are disparate views on this matter. On the one hand, as shown above, a short preliminary procedure such as summary judgment, which requires early and wide discovery, reveals the required information and motivates parties to reach a settlement. On the other hand, any ruling that is made during this stage may seriously compromise the chances of reaching a settlement. When a full investigation of the case is refused, the defendant has no incentive to settle. Conversely, a decision that the case should be fully litigated empowers the plaintiff's confidence in his claims, thus minimizing his desire to end the case through settlement.[168]

C. The New Judicial Sphere of the Adversarial Judge: The Israeli Practice

This Article will now turn to look closely at the Israeli system, with its recently effectuated civil procedure rules marking a prominent example for inserting inquisitorial tools into the adversarial process, and thus affecting the role of the judge as bearing mediational characteristics. This will enable us to examine and analyze a few examples of continental-like procedures adopted by a common law legal system and assimilated into the adversarial process, namely, judges' authority in the pretrial stage; judgment by way of

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[164] CHASE ET AL., *supra* note 162, at 28.

[165] *See* FED. R. CIV. P. 56 (regulating summary judgment).

[166] Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 73 (1990).

[167] Stephen B. Burbank, *Vanishing Trials and Summary Judgments in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591 (2004).

[168] Issacharoff & Loewenstein, *supra* note 166, at 94.

compromise (according to section 79a of the Israeli Courts Law); and the doctrine of the inherent jurisdiction of the court.

i. General Background: The New Israeli Rules of Civil Procedure

In order to examine the new judicial spheres within the Israeli system, this Article will first distinguish between the activity of judges as case managers who refer a case to another forum of dispute resolution, as opposed to cases where judges attempt to settle the case themselves, either of their own initiative or in the framework of particular legislation that allows or even obliges them to do so.[169] Examples of the first group of mechanisms—directing and diverting cases—include the internal organizational dispute-resolution system of the Israeli court system, *MAHUT*,[170] and its assimilation within the new rules of civil procedure;[171] legislation dealing with mandatory mediation through external mediators;[172] and legislation that requires utilization of the mediation procedure prior to filing a lawsuit. In these scenarios, the judge refers the parties to a forum that is related to the courtroom in some way, but which is not an integral part of it, and the judge does not participate in the resolution process. The new Israeli rules of civil procedure emphasize the diversion of cases to alternative dispute-resolution procedures as the preferred path, one which is well-incorporated into the legal process.[173] The mediator in mandatory procedures enjoys, on the one hand, the advantages of institutional repute, having been given a mandate by the legal system, in this case the primary customer. On the other hand, the mediator lacks any actual authority and their competence to settle the dispute varies from case to case and further depends, among other factors, on the type of referral. The referral of cases from the court system reflects the system's attempt at efficiency, to decrease case load and minimize as much as possible the cost of litigation. In this situation, the judge serves as an institutional functionalist, with the limited

[169] *See* Perlman, *supra* note 14, at 367–68. Perlman proposed regulation of the procedure in Israel. *Id.* at 411–13.

[170] Ch. G(1), Old Civil Procedure Regulations, *supra* note 17.

[171] § 37, New Civil Procedure Regulations, *supra* note 15 (concerning the IAC mediators and the officer in charge of the alternative dispute resolution proceeding on behalf of the court).

[172] *See, e.g.*, § 3, Law for the Settlement of Litigation in Family Disputes, 5775-2014, SH 2485 116 (Isr.); *see also* Gali Aviv & Asaf Kshatot-Stein, Law for the Settlement of Litigation in Family Disputes, The Israeli Courts Research Division (May 2019).

[173] *See* §§ 34, 35A(2), 63B(17), New Civil Procedure Regulations, *supra* note 15 (defining "alternative dispute resolution mechanism" in sections 34, 35A(2), and primarily 63B(17), according to which the court shall propose a settlement proposal or judgment by way of compromise or an alternative dispute resolution mechanism to the litigants). Thus, Section 177(5) of the Regulations allows a legal assistant to present proposals to the litigants for referral of the suit to an alternative dispute resolution mechanism. *Id*. § 177(5).

role of diverting the case outside of the system. The managerial judge, or the dispute designer judge,[174] chooses not to hold a dispute resolution process within the courtroom. This may be because there is no suitable legal procedure or because of her belief that the particular dispute at hand has better chances of being resolved with the assistance of a professional third party. It could also be because of her self-perception as a ruling judge, or due to her inability to adjust to a different type of discourse with the parties.

This Article will focus on the alternative stance whereby the judge positions herself as a dispute resolver—whether through means affirmatively afforded to her by law or means that the system allows by not prohibiting, or by broadening judges' discretion and scope of activity. All things being equal, the passive role of the judge in the adversarial system, which grants the parties significant control over the management of litigation, is actually in accordance with the ideology of autonomy which is central to interest-based negotiation and helps promote consent instead of a judicial ruling. Yet the parties in adversarial procedures will usually be represented by lawyers. The lawyers bring into the process the only negotiation style they are familiar with: rights-based discourse, which is a meeting of monologues.[175] The adversarial courtroom, in its original form, is a judge without the ability to significantly intervene, whose discretion is grounded in and limited to existing rules of procedure and whose decisions are examined in appellate courts. Litigants who have forgone their ability to negotiate on their own are represented by legal agents who engage solely in confrontational rights-based discourse. This setting cannot foster consensual and peaceful discourse or a broad understanding of the dispute. When the parties do not have the ability to control the adversarial discourse in the courtroom, the only changeable element in this multi-player event is the role of the judge. A change in the role of judges, or in their own self-perception of their role, may lead to a different dialogue both within and outside of the courtroom. Enhancing the involvement of the Israeli judge in the management of the process through the introduction of inquisitorial-like powers that afford the judge an active role in the negotiation between the parties has indeed instigated such a change.

The new Israeli rules of civil procedure formally express the kind of judicial activism that had already been taking place under the previous rules of civil procedure. The new rules stress the managerial role of judges and reflect judicial activism in the management of litigation and the efficient steering of each case towards resolution of conflict between the parties. The new rules of civil procedure place emphasis on fair trials, accessibility to the public, and

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[174] *See* Resnik, *supra* note 7, at 377, 425.

[175] Avi Sagi, *Hachevra Vehamishpat Beisrael: Bein Siach Zchuyot Lesiach Zehut* [*Society and Law in Israel: Between a Discourse of Rights and a Discourse of Identity*], 16 MEHKAREI MISHPAT 37 (2000) (Isr.).

ending disputes within reasonable timeframes.[176] This framework allows for judges to actively conduct judicial mediation.

For example, the new Rule 63(b)(17) specifically allows a judge in a pretrial hearing to bring before the parties a settlement proposal, to offer ruling by way of compromise, or to suggest an alternative dispute-resolution procedure.[177] These possibilities add to the already existing and broad range of inquisitorial-like powers held by judges in Israel, such as: ordering the addition or removal of parties in a case, hearing testimony from any person present in the courtroom during pretrial, ordering the parties to submit early evidence or testimony, and giving any procedural order geared toward solving the dispute. The inquisitorial involvement of judges during the pretrial phase creates an effective platform for understanding the points of disagreement between the parties at this early stage of litigation. It does so in a way that makes it possible for the judge to present an informed settlement proposal to the parties.

The new rules of civil procedure enable the consented resolution of the dispute at two different stages: first, through an out-of-court procedure, under the supervision of the court in its institutional capacity; and second, when the first option has failed, at the hands of the judge in her capacity as dispute solver during pretrial. One can understand, therefore, that the main reason for making procedural rules clearer, as well as strictly limiting the length of pleadings and expanding the judges' authority, is the desire to allow judges to efficiently manage the procedure and focus only on the ability to reach a just outcome in the shortest time possible.[178] A central motif of the current climate is granting the judge inquisitorial-like authority and expanding the judge's active involvement in the process.

Taken from a different perspective, it could be that the new rules of civil procedure somewhat limit judicial creativity; one could argue that the requirement the new rules have introduced, by which parties need to significantly shorten pleadings and focus on the main aspects of the dispute and the related arguments, could contribute to settling the case in a relatively short time, since the parties themselves have already separated the wheat from the chaff. However, limiting the length of pleadings makes it impossible for the parties to elaborate, thus harming their ability to provide the court with a better

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[176] § 2, New Civil Procedure Regulations, *supra* note 15. In this context, Section 5 prescribes the principle of the public's accessibility to the legal system as a public interest, including the conduct of a "quick and efficient" proceeding. *Id.* § 5. The issue of the speed of the proceeding and reduction of scope of the text formally permitted to be used therein affects the judge's ability to conduct broad dispute resolution procedures vis-à-vis the parties in his courtroom.

[177] Rule 63(b)(17), New Civil Procedure Regulations, *supra* note 15.

[178] *See* Pt. A, New Civil Procedure Regulations, *supra* note 15.

understanding of the dispute at large.[179] Parties will not be able to relate in their short pleadings their interests, motivations, and relational elements, which are details that could assist the judge in understanding the wider context of the dispute, in order to settle it in a true mediational manner. Similarly, limiting the number of pretrial hearings,[180] like the situation in U.K. courts, does not contribute to incentivizing the parties to reach a settlement. When the number of pretrial hearings is limited, the process moves forward at a faster pace than that needed to conduct an alternative process, especially in large and complex cases. In this respect, it seems that the desire to make litigation more efficient and expedite the legal process, in effect, places the parties within a timeframe that actually limits the creative sphere and allows for fewer opportunities to settle the case through active judicial involvement, a process that sometimes requires of the court more time and procedural flexibility.[181]

The new Israeli rules of civil procedure thus reflect two trends. The first is the attempt to strengthen the practice of holding mediation procedures outside of court. This process reinforces the managerial institutional function of court personnel who are not judges and their role in managing and ending cases without significant judicial involvement. An example of this trend is the new authority awarded to the clerks overseeing the mediation process who now can, just like judges, impose sanctions on a party who did not attend a mediation process. For example, a party can be required to pay the mediation fees[182] as part of the *MAHUT* project under which cases are referred to mediation after the pleadings stage. In doing so, the new Israeli rules of civil procedure underscore the significance of the preliminary stage in general, and the mediation stage in particular, by making it an integral part of the legal process itself. The judge, under this regime, plays a significant role in bringing the case to a consented resolution. The second trend reflected in the new rules of civil procedure is the strengthening of the active role of the judge in managing the procedure, while better delineating the range of possibilities available to judges.

This active role of judges is reinforced by the backdrop of the legal tradition from within which they preside. To begin with, the large scope of

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[179] This is despite the requirement in the Old Civil Procedure Regulations which requires pleadings to contain material details that are required for the discourse of rights only. § 9, Old Civil Procedure Regulations, *supra* note 17.

[180] *See* § 63, New Civil Procedure Regulations, *supra* note 15.

[181] § 65C, New Civil Procedure Regulations, *supra* note 15. This section, which was cancelled in the second correction (5780-2020), was not friendly to external settlement negotiations, including mediation proceedings, which were not considered a sufficient cause for rescheduling a hearing.

[182] § 37J, New Civil Procedure Regulations, *supra* note 15; § 99G(c), Old Civil Procedure Regulations, *supra* note 17.

discretion of adversarial judges intensifies their power and radiates upon their actions as they apply conflict-resolution processes within the courtroom. The ability of adversarial judges to integrate purposes, policy considerations, and complex formulas[183] makes it easier for them to develop and use different techniques, among them techniques that help bring the parties to a consented solution, such as settlement. The sphere of discretion of the Israeli judge in employing tools of conflict resolution is intensified given the anti-formalistic culture in Israel, where judges are expected to use their discretion at the stage of judicial ruling (bear in mind that the same judge would hear the pretrial and the trial itself if the case were not to settle).[184] Such discretion could manifest in the balancing of interests; the search for principles of proportionality; or in applying tests of reasonableness, good faith, and other legal doctrines and tools whose outcome is not always predictable before writing the final decision. The complexity and ambiguity—both related to the fact that the legal outcome is not predictable in light of the informal tools that will be employed within the legal process—broadens the sphere of conflict resolution for judges and grants them more power, given the wide range of choices they have.

The integration of legal inquisitorial tools, along with judicial creativity that can be applied regarding the characteristics of the dispute, is interwoven with the enhanced ability of the court to introduce into the persuasion process within the courtroom the complexity of the legal-normative situation of the case at hand. The combination of these two fields—judicial discretion on the legal plane and inquisitorial and conflict-resolution tools on the conflict management plane—forms a new creative space within which the judge can lead the parties towards agreement and settlement in the courtroom.[185]

There are well-known techniques for bringing about settlement that can be potentially assimilated within the courtroom without harming the necessary judicial neutrality[186] and other aspects of due process. These include the ability to predict and reflect to the parties possible legal outcomes of the case, stressing the negative and unpredictable aspects of the legal process and its possible outcomes, use of structural and procedural elements of the litigation process (such as costs), intervening in the lawyer-client-court relationship, incentivizing negotiation between the parties outside of the courtroom, relating to wide interests that do not necessarily fit in dominant legal rights discourse,

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[183] *See supra* note 51 and accompanying text.

[184] For further discussion on judicial discretion and the deviation of the legal text from formalistic principles, see *supra* note 51.

[185] *Cf.* Yuval Sinai & Michal Alberstein, *Expanding Judicial Discretion: Between Legal and Conflict Considerations*, 21 HARV. NEGOT. L. REV. 221 (2015) (presenting a hybrid innovative model for judicial discretion and conflict resolution discretion which may be used by judges to institutionalize and promote judicial conflict resolution).

[186] *See infra* note 189 (describing the development of the legal discussion on causes for judicial disqualification).

and relating to parties' motivations and parties' or their lawyers' reputations. These practices, when combined with a softer, more empathic discourse, create a more open and approachable environment that enables a discussion which includes extra-legal elements, bringing the parties and their attorneys closer together. Methods that work towards consent, settlement, and reconciliation are employed to varying degrees, depending on each judge's capabilities, experience, and expertise.[187]

Alongside the various practices described above, the prediction of the legal outcome, which is a significant tool in the work of the evaluative mediator,[188] serves as a central tool for judges throughout the legal process, and especially during pretrial. Legal prediction makes it possible for the judge to present to the parties a clear reality of the possible outcome of litigation, one which is based on precedent, judicial knowledge, and experience. Consequently, the judge's involvement in the negotiation process, given the common law principle of precedent, necessarily provides more weight to the judge's discretion and the alternative to a court ruling, and bears greater impact on shaping the settlement reached by the parties. It is reasonable, then, for a judge to act as an evaluative mediator, and at the center of the negotiation towards settlement will be predictions and evaluations concerning the legal trajectory of the conflict.

Yet, it must be noted that the practice of legal prediction is problematic when used by the judge who then presides over the case until its end. In order to avoid determining a judicial position before hearing the evidence, especially given the fact that the inability to sway a judge's position is cause for recusal,[189] a practice of conducting settlement discussions "off the record" has

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[187] There are papers on judicial mediation, which predominantly analyze narrow and limited interests. *See* Alberstein, *supra* note 8; Perlman, *supra* note 14, at 389; Mironi, *supra* note 14, at 499; Finkelstein, *supra* note 110, at 650; Sela et al., *supra* note 8.

[188] Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 27 (1996).

[189] § 77A, Courts Law (Consolidated Version), 5744-1984, SH 1383 68, as amended (regulating the law of judicial disqualification and establishing a general cause for disqualification where "circumstances that create actual concern of bias in the conduct of the trial" exist). It may be said that disqualification of a judge under Israeli law requires that it be shown that, in the eyes of a reasonable judge, there is actual concern that the specific judge has formed his opinion and is no longer open to persuasion, although he has the duty to be open to persuasion at the relevant point in time. The evidence in support of a cause for disqualification must be significant. *See* YIGAL MERSEL, DINI PASLOT SHOFAT [JUDICIAL DISQUALIFICATION LAW] (2006); CivA 11146/08 Eiriat Or Akiva Neged Ben Nayim [Mun. of Or Akiva v. Shlomo Ben Nayim], Nevo Legal Database (Jan. 18, 2009) (Isr.). Case law emphasizes that conciliation attempts by the court, even if they express a certain position with respect to the proceeding, do not establish actual concern that the judge is biased or has already resolutely made up his mind, and therefore do not constitute a cause for disqualification. *Mun. of Or Akiva*, *supra*; CivA 7386/08 Eilat Inn Be'am Neged Chacham [Eilat Inn Ltd. v. Mickey Chacham], Nevo Legal Database (Oct. 26, 2008) (Isr.); CivA

developed, and judges' predictions are not registered as part of the court transcript.[190] What was said off the record cannot serve as a basis for judicial ruling, should there be one. Still, this practice remains problematic in that the same judge who holds this external dialogue with the parties will also rule in the case eventually, if it is not settled. There is a question as to how the parties are asked to trust the judge under these conditions, and specifically, to trust in his or her ability to disregard initial predictions when making judgment. In the following section, this Article will review three unique elements that create a special judicial sphere in Israeli civil litigation.

a. Rule 79A of the Israeli Courts Law (1984)

Placing control over the proceedings in the hands of judges, rather than the parties and their attorneys, while minimizing judicial review of judges' rulings, receives unique expression in Rule 79A of the Israeli Courts Law. The rule authorizes judges to give a "ruling by way of compromise."[191] According to this unique procedure, the adversarial judge, equipped with inquisitorial tools, is transformed from an involved spectator to an active participant with the ability to judge, based on how he perceives the parties' wishes, and what he sees as the best way to lead them to settle.[192] The nature of the judicial decision under this unique procedure, as well as its almost complete immunity from the intervention of appellate courts,[193] reflects an extreme on the

2634/07 Zehavi Neged Hickry [Zehavi v. Hickry], Nevo Legal Database (July 16, 2007) (Isr.). The court's opinion that one of the parties is in a better opening position, from a legal perspective, cannot either, in itself, establish a cause for disqualification. CivA 9191/00 Ventura Tikshoret Proiekt Internet Israel Be'am Neged Sertei Hayam Ha'adom Be'am [Ventura Commc'ns Isr. Internet Project Ltd. v. Red Sea Films Ltd.], Nevo Legal Database (Feb. 21, 2001) (Isr.); CivA 287/88 Manof Signal Hevra Lefinanceim Vehaskahot Be'am Neged Abdel Razek Salayme [Manof Signal Fin. & Inv. Co. Ltd. v. Abdel Razek Salayme] 44(3) PD 758 (1988) (Isr.). Therefore, such assessment, if made at a preliminary stage of the proceeding (e.g., a pretrial hearing) and on a prima facie basis, cannot lead to disqualification of the judge, because a judge of the court is presumed not to arrive at a final decision on the law and on the matter before her prior to the conclusion of all trial proceedings, and the mere suggestion of a settlement proposal by the judge does not indicate that the court has formed a final opinion on the proceeding to which the proposal pertains. MERSEL, *supra*, at 178–80; *Eilat Inn Ltd.*, *supra*; CivA 4601/07 Hamda Neged Kial [Hamda v. Nihal Kial], Nevo Legal Database (Jan. 7, 2008) (Isr.); CivA 7265/98 Halichal Neged Bersky [Halichal v. Bersky], 52(5) PD 477 (Jan. 14, 1999) (Isr.).

[190] Rule 13, Rules of Ethics for Judges, 5767-2007, KT 6591 934 (concerning settlement, mediation, and arbitration).

[191] § 79A, Courts Law (Consolidated Version), 5744-1984, SH 1383 68, as amended.

[192] *See* Ben-Noon & Gabrieli, *supra* note 30, at 258, 280.

[193] *Id.* at 260; CivA 1639/97 Agiapolis Be'am Neged Hacustodia Internazionala de Terra Santa [Agiapolis Ltd. v. Custodia Internazionala de Terra Santa], 53(1) PD 337 (1999) (Isr.); CivA 8560/17 Edri El Israel Karkaot Be'am Neged Afiki Nadlan Bazafon

spectrum of inquisitorial-like powers that are granted to judges in Israel. This is especially true when considering that judges base their rulings on their own investigation and understanding of the facts during any stage of the factual-legal discussion,[194] and sometimes even before most of the evidence has been brought before the court.

The authority to make a ruling by way of compromise could be understood as limiting the judge to middle-ground solutions or this authority could be seen as a judicial stipulation, like an arbitration agreement that sets clear boundaries of process and means of ruling.[195] In practice, however, Rule 79A grants judges a very wide scope of discretion.[196] This procedure is based on judicial expertise which allows the judge to reach a ruling that the judge is not obliged to explain and justify and that does not necessarily stem from rules of evidence or substantive law. Such a ruling could be defined as "intuitive," and is grounded in substantial faith in the ability of judges to find the truth and reach a just settlement based on their status and experience. In a way, the judge's authority in this process aligns perfectly with the inquisitorial tradition.[197] The parties authorize the judge to make a ruling based on the documents before her, without completing the evidentiary stage, and without the obligation of a full, reasoned verdict. It is reasonable to assume that in most

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Be'am [Edri El Isr. Land Ltd. v. N. Real Est. Channels Ltd.], Nevo Legal Database (Dec. 11, 2017) (Isr.); LCivA 2628/09 Levine Neged Assor [Levine v. Assor], Nevo Legal Database (Sep. 21, 2009) (Isr.); LCivA 7406/08 Tavor Neged Benori [Tavor v. Benori], Nevo Legal Database (May 6, 2009) (Isr.); CivA 6780/19 Medinat Israel Neged Istadrot Meditsinit Hadassa [State of Isr. v. Org. Med. Hadassa], Nevo Legal Database (Aug. 16, 2020) (Isr.). Even if the parties' agreement under this section does not inherently deny them the right to appeal, intervention by the court of appeals is limited solely to rare cases where:

> (1) The court shall have exceeded its authority; (2) The court shall have arrived at conclusions and outcomes that are completely unreasonable on the face of it; (3) The court shall have completely ignored the arguments of the parties' counsel; (4) The court shall not have allowed the parties' counsel to present their arguments; (5) Other grounds of importance based on which the outcome of the judgment cannot, under any circumstances, be tolerated, e.g., the court shall have erred in understanding the agreement between the parties and such error is apparent on the face of it.

LCivA 2587/98 Meidenberg Yetsor Obneiat Mivnim Be'am Neged Sasson [Meidenberg Structure Constr. & Manufacture Ltd. v. Sasson], Nevo Legal Database (Aug. 23, 1999) (Isr.).

[194] Sela & Gabay-Egozi, *supra* note 103, at 13.

[195] *See* Yuval Sinai & Michal Alberstein, *Court Arbitration by Compromise: Rethinking Delaware's State Sponsored Arbitration Case*, 13 CARDOZO PUB. L., POL'Y, & ETHICS J. 739, 739–41 (2015).

[196] *Id.* at 741; CivA 1639/97 Agiapolis Be'am Neged Hacustodia Internazionala de Terra Santa [Agiapolis Ltd. v. Custodia Internazionala de Terra Santa], 53(1) PD 337 (1999) (Isr.).

[197] Ben-Noon & Gabrieli, *supra* note 30, at 266–70; CivA (DC TA) 2156/08 Peretz Neged Dombalsky [Peretz v. Dombalsky], Nevo Legal Database (Jan. 13, 2010) (Isr.).

cases, judges use this rule to provide an approximate ruling, or one that is based only on written data, similar to the work of the inquisitorial judge.[198] The more information a ruling based on Rule 79A takes into account and the more advanced the stage of the process, the more similar it becomes to a ruling of an inquisitorial judge; in practice, many of the civil cases in Israel are managed with party consent according to this method.[199]

Given that the judge's considerations, as well as the way in which she views the conflict, the parties' interests, and the range of solutions they might agree to, are not known to the parties when they authorize the judge to make a ruling based on Rule 79A, they take a chance regarding the expected outcome. This element of uncertainty might deter parties and their attorneys from agreeing to a ruling based on Rule 79A. Even the attempt to create a practical formula for calculating the sum that would be awarded by the court fails to minimizing the fears that are inherent to this type of adjudication.[200] Nevertheless, the rise of the status of judges in a way that is foreign to the traditional role of adversarial judges creates the kind of trust in judges that helps parties give them the authority to end the case by way of compromise, without a reasoned decision that is the outcome of an organized evidentiary procedure. A combination of persuasion and consent determine the mechanism for the resolution of the conflict. This process is grounded in seeking compromise—not necessarily in the legal sense—where the expectations of the parties are that the resolution of the case will be based on just grounds and broad considerations. Among these considerations is the judge's understanding of the parties' interests and each side's boundaries concerning an acceptable outcome or settlement. Parties' consent to this form of adjudication demonstrates the high degree of trust that they and their lawyers place in judges in a manner not typical to the adversarial system. Yet, in a way, agreeing to receive any outcome through a ruling by way of compromise is identical to agreeing to receiving a fully reasoned judgment, as both represent a decision to turn to the procedures of the legal system. In this sense, the significance of consent is not with regard to the way in which the conflict has ended, but relates only to the mechanism chosen for ending it.

It seems that the process of parties authorizing the judge to seek compromise and the use of the term "compromise" both impact the perception of the role of the judge, who receives a new kind of trust from the parties. In return

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[198] *See* Sela & Gabay-Egozi, *supra* note 103.

[199] There is a similarity between this form of decision and the criminal mediation presently employed in criminal trials. *See* Ami Kobo, *Hagishor Haplili* [*Criminal Mediation*], 24 HAMISHPAT 301 (2017) (Isr.); Michal Alberstein & Beatrice Coscas Williams, *Quelle place pour la victime d'infraction pénale dans la médiation pénale en Israël?* [*What Place for the Victim of Criminal Offense in Criminal Mediation in Israel?*], *in* LES CAHIERS DE LA JUSTICE 2018/3 REVUE DALLOZ 509 (2018) (Fr.).

[200] Klein, *supra* note 30.

for this trust, the judge sees to some of the essential interests of the parties as they are presented to her. The ability of the judge to conduct a different kind of dialogue with the parties and their attorneys, and their willingness to authorize her to make a ruling even before they have had the opportunity to present the full evidentiary picture of the case, somewhat softens the legal process and brings into the courtroom a new way of thinking.[201] From the moment the parties forego formal procedure, including the possibility to monitor the judge and appeal her decision,[202] and instead grant her the authority to make a ruling without providing reasoning—in an intuitive manner to a large extent—a ruling that is not bound by law, the judge has become an active participant in an alternative discourse with the parties, one that is broader and more diverse. Within such discourse, the judge is not obligated either to focus on the specifics of the law, or on rights-based discourse. Moreover, the parties are willing to put the decision in the judge's hands since they perceive her as someone who understands the broad interests and wishes of each party. They also trust that she will take these elements into consideration when making her decision, based on compromise and consent. This technique, therefore, establishes double trust: the parties trust in the understanding, skill, and decency of the judge to make a ruling in their case without procedural safeguards or evidentiary tools; from this follows trust in the procedure itself, as one that allows the judge to rule according to it. The inquisitorial element inherent to this unique rule, combined with the wide discretion granted to judges in common law systems, generate the necessary trust of the parties, who believe that the outcome under this procedure will be close to what the parties themselves would have agreed on if they had the ability to reach a settlement on their own. The compromise, in this sense, is an expected outcome that takes into account the parties' essential interests and, accordingly, allows judges the ability to declare, by way of judicial ruling, the parties' consent.

b. The Pretrial

Another example of the assimilation of inquisitorial procedures within the Israeli legal system is the institutionalization of the pretrial stage, which allows the judge significant involvement in the process while decreasing the

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[201] Indeed, the adversarial courts' role of incentivizing dispute resolution proceedings has grown concurrently with the tempering of their adversarial nature. Cortés, *supra* note 79, at 63 (discussing cases in the U.K.); MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS viii (1981).

[202] CivA 10838/05 Sax Neged Klinger [Sax v. Klinger], Nevo Legal Database (Mar. 23, 2008) (Isr.) (stating that the purpose of the appeal-limiting approach in 79A is the purpose of the section itself, which allows the parties to conclude the dispute quickly and efficiently, while saving on costs, as well as relieving the workload of the court, and the expectation of continued litigation on appeal is necessarily also reduced).

control of the parties and their attorneys.[203] During pretrial, the judge holds the reins, initiating procedures to move the case forward and even calling and examining witnesses or the parties themselves, all based on broad discretion. During the pleadings stage, as well as the evidentiary stage, the adversarial characteristics are more dominant. Yet even during the evidentiary stage, the judge will express her opinion regarding the weight of certain testimony and evidence and will encourage the parties to reach a settlement.[204] The involvement of the judge during pretrial, which is intended, first and foremost, to find at least partial solutions and minimize the gap between the parties with regards to power and resources, narrows the possibility of injustice due to power imbalances between the parties. Moreover, it allows the judge to steer the main discussion in the case towards essential rulings on the questions brought before the court.[205] It is the flexible nature of the pretrial, and the extra involvement of the judge in directly conversing with the parties and their attorneys, that helps minimize the imbalances between the parties.

Rule 140 of the previous Israeli civil procedure rules awards the judge the authority to set a pretrial hearing to explore the possibility of reaching a settlement between the parties.[206] Another, more specific, rule dealing with fast-track cases allows the judge "to offer the parties a settlement proposal, to rule by way of compromise, according to Article 79A of the Israeli Courts Law or, based on the parties' request, approve and validate a settlement they have reached on their own" (i.e., grant it the status of a court ruling).[207] In the New Civil Procedure Regulations, judges' authority to offer a settlement in pretrial has been implemented in a more general rule that applies to all civil cases.[208] In doing so, the new rules formalize the existing practice of judges who continue to offer settlement proposals to the parties even after the pretrial, as the information in the case accumulates. Yet, the discourse during pretrial remains the most appropriate context for the judge to gain a direct impression of the parties before her. In turn, this helps her navigate the course of the case in the most egalitarian manner while focusing on the essential interests of each

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[203] *See* LCivA 3312/04 Assurance General De France Neged Hakones Harishmi Betafkido Kemefarek Bank Tsafon America Be'am [Assurance Gen. De Fr. v. Off. Receiver in his Capacity as the Liquidator of the N. Am. Bank], 60(3) PD 245 (Oct. 26, 2005) (Isr.). *See also* §§ 143–47, Civil Procedure Regulations, 5744-1984 (Isr.) (authorizing the court to take various measures for pretrial purposes or at the actual pretrial hearing). Such powers were expanded and clarified in the New Civil Procedure Regulations, as specified above. § 63, New Civil Procedure Regulations, *supra* note 15.

[204] LEVIN, *supra* note 60, at 126–28, 149–53.

[205] *See* § 3(b)(7), Court Regulations (Department for Assigning Cases in Courts and Labor Courts), 5762-2002, KT 6189 1198.

[206] § 140, Old Civil Procedure Regulations, *supra* note 17.

[207] *Id.* § 214K(d)(8).

[208] § 63, New Civil Procedure Regulations, *supra* note 15.

party and allowing them to present the whole of their side in order to determine where each party stands during this early stage.[209]

Since it is difficult to infer the legislature's intentions in creating the rules concerning pretrial,[210] their inquisitorial nature is revealed by their content as well as from the literature.[211] The accepted view is that the pretrial has replaced the "preliminary hearing" that used to be held at the district court in Tel Aviv. This practice was mainly intended to examine the possibility of settling the case, arranging the pleadings, and determining the stages and course of the litigation process. The "preliminary hearing" was not grounded in the rules of civil procedure and probably originated as part of the court's inherent powers doctrine.[212]

The pretrial was intended to remedy some faults of the adversarial procedure rather than abandoning this system altogether. This includes controlling for the possibility of misuse of the legal procedure by the usage of baseless claims; misuse of the pleading stage by employing lawyerly trickery, which often conceals the true disagreements between the parties and the actual interests involved;[213] and finally, dealing with the excess inflexibility of pleadings under this system, which interferes with the judicial process making it more difficult to reach just solutions.[214] Given the success of pretrial proceedings in the American legal system, the Israeli rules of civil procedure are based on the American model.[215]

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[209] However, although the extent of the judge's involvement in the examination of witnesses is larger than before, the rule still holds that the court will only rarely summon witnesses of its own initiative (as opposed to summoning the parties themselves). CivA 125/89 CPA Balas Neged Izavon Hamanocha Rosa Rosenberg [Balas v. Est. of the Late Rosa Rosenberg] OBM, 46(4) PD 441, 450–51 (1992) (Isr.). *See also* § 178, Old Civil Procedure Regulations, *supra* note 17 (concerning the summoning of witnesses by the court).

[210] Preceding explanatory notes and transcripts are not accessible, because the Rules are not a statute, but rather regulations. *See* §§ 143–47, Civil Procedure Regulations, 5723-1963, KT 1477 1853 (Isr.); Ch. M, §§ 143–47, Old Civil Procedure Regulations, *supra* note 17. See *also* Goldstein & Burnovsky, *supra* note 121, at 324–26.

[211] Goldstein & Burnovsky, *supra* note 121; *see also* ADI AZAR, KDAM MISPHAT [PRETRIAL] 125 (1999) (Isr.) ("According to the modern approach, the pretrial is a procedural proceeding of inquisitorial nature. The court holds vast powers for clarification of the dispute, for examination of the foundation of the arguments and for appropriate influence on the achievement of settlements or procedural agreements, which are intended to narrow down the dispute"); AZAR, *supra*, at 41 ("At the pretrial stage, the proceeding tilts toward the German system, whereas in the trial itself (the evidence presentation stage) the system tilts once more in the adversarial direction.").

[212] Goldstein & Burnovsky, *supra* note 121, at 325. *See also* Ex Parte Peterson, 253 U.S. 300, 312 (1920) ("Courts have . . . inherent power to provide themselves with appropriate instruments required for the performance of their duties.").

[213] Goldstein & Burnovsky, *supra* note 121, at 322 n.36.

[214] *Id.* at 313–15.

[215] *Id*. at 316, 318–20.

The initial exposure of the judge to the case and the parties before her is designed to determine the procedure for the hearing of evidence and the management of the entire litigation process. However, due to its role as a framework for conflict resolution and expedited inquiry of the points of disagreement based on a clear intent to resolve the conflict there and then, this meeting has become a series of hearings, which deviates from the original objective. The average number of pretrial hearings in a regular civil case in Israel has reached 1.7 or higher,[216] illustrating that the significance of the preliminary hearing extends far beyond organizing the procedural aspects of the litigation of the case.

During pretrial, a judge is authorized to order that any party or person that is relevant to the dispute appear before the court and give testimony.[217] This authority is identical to that of the examining magistrate (in inquisitorial systems), who chooses to manage the case by way of summoning the witnesses who are required for revealing the truth.[218] The summoning of witnesses is no longer exclusively at the discretion of the parties and their attorneys; rather, the judge becomes an active participant in designing the process that will lead to her eventual legal ruling.[219] This procedure allows the judge to set paths other than those required to reach a legal determination, including introducing into the courtroom the kind of discourse that evolves in pretrial with the witnesses or other litigants summoned by the judge. The result is a more inclusive and appeasing discourse that deals with the broad interests of the parties. The opportunity to conduct direct dialogue with litigants allows for observation and understanding of the motives leading up to the conflict. While the original grounds for introducing pretrial into adversarial procedures was the desire to make the legal process more efficient,[220] the tools afforded to judges within

[216] In Israel, the judge presiding over the pretrial is also the judge who will conduct the entire proceeding until a decision is handed down by judgment (where the case reaches the decision stage). On the other hand, in the United States, separation is applied in this context—one judge conducts the pretrial, including settlement negotiations, whereas another judge presides over the main proceeding. *See* Sela et al., *supra* note 8, at 98; Roselle L. Wissler, *Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences*, 26 OHIO ST. J. ON DISP. RESOL. 271, 272–73 (2011).

[217] §§ 146–47, Old Civil Procedure Regulations, *supra* note 17.

[218] *See id*.

[219] Shalev Ginossar, *Beshuley Hachakika – Ma Nishtana Baprotsedura Haezrachit* [*On the Fringes of Legislation – What has Changed in Civil Procedure*], 19 HAPRAKLIT 315 (1963) (Isr.). According to Ginossar's approach, the Regulations enable the judge to step out of his passive role of observation and inference, and she is required to strive to uncover the issues in dispute, and, to that end, make any determination and demand anything whatsoever that may be of assistance to her. *Id.* at 323. For this purpose, she may examine the litigants at an early stage of the proceeding, before the pleadings force the court to address many other witnesses *Id.* at 324.

[220] §§ 140–50, Civil Procedure Regulations, 5723-1963, KT 1477 1853 (Isr.).

this framework have given rise to a process which, when employed wisely, promotes discourse of another nature.[221]

The summoning of witnesses at this early stage to better elucidate the pleadings in itself incentivizes the parties to reach an agreement. The investigation of a witness by the judge may lead the parties to gain new insight that does not necessarily fit with their initial aspirations. This insight includes the understanding that their original expectations were not realistic, as well as a better understanding of the factual reality that either supports or refutes their original claims. Accordingly, this helps the parties understand the feasibility of a settlement and the reasonableness and proportionality that are required to reach an agreement. This preliminary investigation creates a more suitable environment for compromise since the legal costs are still low at this stage, so the parties may be willing to invest money they were prepared to spend on trial as part of the settlement agreement.

The ability of the judge to directly approach the parties themselves in a way that allows them, for the first time, to speak in a language that is not overly formal or formalistic creates a new discourse and a unique atmosphere. It represents a transition from a place in which pleadings serve as the only discussion until after the hearing of evidence and witnesses, to a place in which the parties tell their own story at a stage when the judge cannot yet rule. Judges' investigations of witnesses or parties are conducted in a balanced, moderate manner. The investigations are directed towards finding the truth, and as such, they create a broader perception of the conflict through direct dialogue. Such discourse provides opportunities for finding a just and suitable solution, which remains faithful to the legal and factual reality that was revealed before the judge during pretrial. Were it not for this unique tool, the judge would be exposed to the complete details of the case for the first time only after the evidentiary stage, or sometimes even after the summation of the case. The expansion of authority of judges during pretrial turns them into case managers, investigating the parties and examining the evidence. This expansion forms the basis of a conflict resolution process that is guided by the judge, one constructed upon the parties' own stories, along with an early and thorough knowledge of the facts and evidence in the case. This process also rejects adversarial characteristics which, as mentioned before, conceal the true nature of the conflict.

In addition, the pretrial can prevent escalation of conflict that may occur after the parties have been exposed to each other's affidavits and need to bring in additional witnesses to substantiate their claims.[222] In pretrial, the judge can

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[221] Ze'ev Tzeltner, *Yeilut Bebeit Hamisphat* [*Efficiency in Courts*], 23 HAPRAKLIT 189 (1967) (Isr.). The pretrial proceeding is the right platform for concluding the trial by way of compromise. *Id.* at 192.

[222] Yet, it is actually affidavits—which as a rule contain conjectures, motives, and hearsay—that form a more extensive document than pleadings, occasionally also reflecting the

base her opinion on preliminary evidence and her own investigation, rather than basing it only on the agenda promoted by the parties. Discussion in the presence of the parties and their attorneys mitigates, at least to some degree, the cognitive biases typical of legal adversaries. These biases characterize the litigation process, which here can be avoided before the process has started.[223] For the sake of legal prediction, a position based on evidence and a deeper understanding of the case is more convincing and will be a far more effective and authoritarian tool in a judge's attempt to resolve the conflict between the parties.

The presence of a third party who holds the authority to uncover the truth, one who has the ability to speak with litigants above the heads of their lawyers, and, in doing so, diverts the discussion away from confrontation, provides a unique platform for the evolving perception of the judge as a conflict resolver.[224] The judge as conflict resolver works to delay the evidentiary stage of litigation to minimize legal costs and prevent the escalation that often ensues with the submission of evidence. This reality stands in opposition to the original objective of the pretrial: to expedite the litigation process and make it more efficient. Delay is now initiated by the judge, and occurs through the setting of several pretrial hearings,[225] referring the parties to out-of-court mediation or insisting on a thorough completion of all preliminary procedures before the trial can move forward. All of the above incentivizes the parties and their lawyers to bring before the court the whole of the controversy, including essential evidence that supports each side's version, during the pretrial stage. These actions shift the center of gravity of the litigation to the beginning of the process, causing fundamental changes in legal procedures and relative

parties' true interests by laying down the entire story before the court. In this context only, it may be argued that the affidavit, which is required for support and evidence, mitigates the initial positions set out in the pleadings and establishes a broader story, which provides the judge with an effective and wide picture of the discourse before her. It may thus be said that the affidavit serves the court as an efficient instrument in its examination of alternative ways to resolve the dispute.

[223] On cognitive biases, see Ben-Noon, *supra* note 41, at 189; Michal Alberstein, *Al Kshalim, Ratsionaliut Mogbelet, Vekolot Negdiim: Tarbuyot shel Masa Umatan, Veshel Mishphat* [*Of Failures, Limited Rationality and Counter Voices: Cultures of Negotiation and Law*], *in* LAW SOCIETY AND CULTURE – LOVE SENTENCES 657 (2005) (Isr.).

[224] *See* Perlman, *supra* note 14, at 368 (making a distinction between a narrow model of settlement-oriented judicature, under which striving for a settlement originates from considerations of efficiency and cost saving, compared with a broad model, under which judicial activity is driven by the ideology and value of favoring a quality solution which, beyond addressing rights that concern needs and interests, factors in relationships and psychological wellbeing). Also see the principle suggested by Daicoff, which addresses everything beyond rights, Susan Daicoff, *Law as a Healing Profession: The "Comprehensive Law Movement"*, 6 PEPP. DISP. RESOL. L.J. 1, 4 (2006).

[225] *But see* § 63, New Civil Procedure Regulations, *supra* note 15 (striving to shorten the pretrial stage by limiting the number of pretrial hearings).

burdens of proof. All of this occurs in a manner in which each party brings before the judge every detail that may affect the possible paths towards settlement.

c. The Inherent Powers Doctrine

Another tool with inquisitorial characteristics that is used in adversarial legal systems is the doctrine of "inherent powers" of the court,[226] whereby the court grants itself authority to rule upon matters that existing law does not specifically authorize it to rule on.[227] This is an exception to the principle of legality and the general rule that any state authority only bears the powers that were specifically granted to it by law. This rule is intended to limit and restrain the power of state authorities, including the judicial branch, to prevent arbitrariness and tyranny and strengthen the fundamental democratic principle of checks and balances.[228] The doctrine of inherent power was recognized by courts to create procedural tools and correct procedural flaws, without the need for specific authorization in existing laws.[229] Such empowerment of the judge's authority is only exercised in exceptional cases.[230] Examples include when the judge believes that the specific circumstances before her, as well as considerations of justice, entail not preventing necessary legal remedy,[231] or when the judge believes exercising the power is necessary in order to maintain

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[226] There is no difference between use of the term "inherent jurisdiction" and use of the term "inherent powers," and the doctrine applies not only to superior courts, but is implemented in practice by all courts. Marcelo Rodriguez Ferrere, *The Inherent Jurisdiction and Its Limits*, 13 OTAGO L. REV. 107, 110 (2013). *See also* Cocker v. Tempest (1841) 151 Eng. Rep. 864, 7 M. & W. 502, 503–04 (U.K.) ("The power of each Court over its own process is unlimited; it is a power incident to all Courts, inferior as well as superior; were it not so, the Court would be obliged to sit still and see its own process abused for the purpose of injustice.").

[227] *See* ROSEN-ZVI, *supra* note 21, at 233–77; FamA 3778/12 Galfenbeum Neged Medinat Israel [Galfenbeum v. State of Isr.], Nevo Legal Database (Sept. 29, 2014); LCivA 6339/97 Roker Neged Salomon [Roker v. Salomon], 55(1) PD 199 (1999) (Isr.); LCivA 2327/11 Ploni Neged Ploni [John Doe v. John Roe], Nevo Legal Database (Apr. 28, 2011).

[228] *See* I. H. Jacob, *The Inherent Jurisdiction of the Court*, 23 CURRENT LEGAL PROBS. 23, 51 (1970) (defining inherent jurisdiction as a necessary and equitable doctrine that judges rely on to ensure due process, prevent oppression and secure fairness between parties.); Rodriguez Ferrere, *supra* note 226, at 108–10.

[229] Jacob, *supra* note 228, at 24.

[230] *See* Jolowicz, *supra* note 35, at 281; LCivA 1233/91 Garbi Neged Ben David [Garbi v. Ben David], 45(5) PD 661, 668 (1991) (Isr.); *Roker*, 55(1) PD 199; *John Doe*, LCivA 2327/11.

[231] CivA 230/87 Shkolnik Neged Zakai [Shkolnik v. Zakai], 46(3) PD 279, 284 (1992) (Isr.).

the court's essential role and its institutional status and capability.[232] Given the problematic nature of this doctrine as an exception to the principle of legality, the Israeli courts have interpreted the inherent power doctrine in a very strict and minimal fashion. It is applied only as a residual solution and mainly with regards to procedural questions, and is used only in rare cases when there is no harm to basic rights and with particular sensitivity to natural justice principles.[233] Judicial deeds based on the inherent powers doctrine are detached from the parties' procedural conduct, the rules of evidence, and sometimes even the instructions of substantive law. These actions stem from the judge's perception of her own role and her desire to reach a just outcome.

The content of the inherent powers of the court remains unclear and vague,[234] and it is difficult to create a clear definition for this term. Given a judge's authority to make decisions that are not in accordance with the rules of procedure, the inability of parties to predict the use that a judge might make of this power is an incentive to try and end the conflict.[235] While legal systems that give wide interpretation to this authority can be found,[236] the scope of the doctrine and its limits can be inferred from the practice of how courts actually use it.[237] The most typical examples would be when a court uses its inherent

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[232] Case 678/82 Tayar Neged Medinat Israel [Meir Tayar v. State of Isr.], 36(3) PD 386 (1982) (Isr.).

[233] *John Doe*, LCivA 2327/11.

[234] *Roker*, 55(1) PD at 264–68.

[235] The general definition of "inherent jurisdiction" prevalent in common law countries was conceived by scholar Sir Jack Jacob as follows: "residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them." Jacob, *supra* note 228, at 51. *See also* Rodriguez Ferrere, *supra* note 226, at 108. This definition was affirmed by the supreme courts of Canada, England, and New Zealand. In Canada, which has embraced this definition, it was determined that inherent jurisdiction may be used in many cases and in various forms, as none of the theories of inherent jurisdiction purport to define its bounds, and the courts will examine the use thereof according to the circumstances on a case-by-case basis. *See* R v. Caron, [2011] 1 S.C.R. 78, 94 (Can.); Ocean v. Econ. Mut. Ins. Co., [2009] 281 N.S.R. 2d 201 (Can.).

[236] M. S. Dockray, *The Inherent Jurisdiction to Regulate Civil Proceedings*, 113 L.Q. REV 120, 120 (1997).

[237] *See* Dalia Even, *Shamchuto Hatvuaha shel Beit Hamisphat – Makor Leseadei Yosher* [*The Inherent Jurisdiction of the Court – A Source of Equitable Remedies*], 7 MISHPATIM 490 (1977) (Isr.); ROSEN-ZVI, *supra* note 21, at 228; Pinchas Goldstein, *Hasamchut Hatvuaha shel Beit Hamishpat* [*The 'Inherent Jurisdiction' of the Court*], 10 IYUNEI MISHPAT 37 (1984) (Isr.); Jacob, *supra* note 228 (reviewing the uses made by courts under this definition and finding five prominent criteria: the use applies to procedure rather than substance, i.e., the doctrine is an instrument for the administration of justice rather than justice itself; a shortened proceeding rather than a full evidentiary proceeding; the doctrine applies to everyone not only the parties to the proceeding; the power is completely different than the court's use of ordinary judicial discretion; the rules of inherent

powers in making procedural decisions relating to matters that were not regulated by the legislator, and the extension of appointed schedules that were set by legislation or in previous court decisions. In such cases, the court has extended its own authority while simultaneously recognizing its subordination to the basic principles of the legal system: natural justice, reasonableness, and constitutional rights.[238]

The inherent powers doctrine allows the judge to apply her own interpretation to minimize the gap between the legal reality and what a just outcome where there are no clear rules that prevent her from doing so. Thus, from a theoretical standpoint, the doctrine establishes a wider procedural sphere and serves as a tool that blurs a clear-cut legal outcome. The implication of the ability of judges to exercise this doctrine is the involvement, at times unexpected, of the judge in the process before her, and a way to bypass findings and facts that were presented during the legal process, all in order to reach a legal conclusion that fits with the judge's own perception. This is a judicial technique of an active judge which does not fit within the traditional role of the adversarial judge. This requires a process of inference, which is neither linear nor a direct outcome of the legal and factual findings, with an objective to rectify social order even when strict legal procedure and interpretation would have led to a different outcome.[239]

Exercising this authority affords the judge the ability to bring the parties to a settlement, even when there is a seemingly clear expectation concerning a certain legal outcome. This is because it remains possible that the judge will reach another conclusion. This is true despite the authority's rare use, and further, despite its use only under unique circumstances and with regard to procedural questions.[240] Exercising the inherent powers doctrine is a tool which is not a part of the usual discretion of judges, or even part of the usual policy

jurisdiction are an addition to, not a substitute for, the rules of the court). See also the instructive analysis by Honorable Justice Danziger in *John Doe*, LCivA 2327/11.

[238] *See* ROSEN-ZVI, *supra* note 21, at 228; HCJ 4703/14 Sharon Neged Nasi Beit Hamishpat Haelion [Sharon v. Chief Just. of the Sup. Ct.], Nevo Legal Database (Nov. 30, 2014) (Isr.); LCivA 4088/14 Badir Neged Rashut Mekarkeai Israel [Badir v. Isr. Land Auth.], Nevo Legal Database (July 2, 2014) (Isr.); M.T.A. 2911/16 Medinat Israel Rashut Hamisim Neged Minrav [State of Isr. Tax Auth. v. Minrav], Nevo Legal Database (Apr. 25, 2016) (Isr.). Court rulings hold additional examples of the use of the inherent jurisdiction made by courts. For further details, see ROSEN-ZVI, *supra* note 21, at 228–33, and the references mentioned there; Amal Jabarin, *Hazchut Leanonimiut, Zchut Hagisha Learkaot; Samchut Tvuaha Vema Shebinehaen* [*The Right to Anonymity, the Right of Access to Court, Inherent Jurisdiction and their Interrelations*], 29 MEHKAREI MISHPAT 309 (2013) (Isr.).

[239] *See* FamA 3778/12 Galfenbeum Neged Medinat Israel [Galfenbeum v. State of Isr.], Nevo Legal Database (Sept. 29, 2014) (Isr.); *Roker*, 55(1) PD 199; *Sharon*, HCJ 4703/14; *Badir*, LCivA 4088/14; *Minrav*, M.T.A. 2911/16.

[240] *John Doe*, LCivA 2327/11.

making and values typical to the work of the adversarial judge.[241] It decreases certainty regarding the expected legal outcome as it grants the judge the authority to lead the parties to a consented outcome that is different from the one that would have been reached through linear legal judgment. The very possibility, even if rare, that the judge may use this procedure effectively grants the judge the power to blur the legal prediction concerning the outcome of the case, thereby incentivizing the parties to enter a process of negotiation and settle. When the parties' predictive ability is undermined in light of the inherent powers doctrine, their interest to shift to a path of compromise and consent increases.

D. Examples of New Judicial Spheres in England

The English legal system adopted practices of an inquisitorial nature, including the use of dispute-resolution mechanisms. The philosophical grounds for the assimilation of inquisitorial ideology within English law can be attributed to the Lord Woolf reform.[242] This reform regulated preliminary procedures and pre-action protocols in a way that enables the maximization of settlement processes, with the positive declaration that litigation should be the "last resort."[243] This transforms the ideology at the heart of the adversarial procedure from the notion of "justice on the merits" to "access to justice."[244] The committee, in examining the failures and flaws of the existing legal system, especially concerning providing practical and swift response to the management of conflicts, inserted a basic principle of the inquisitorial system into the heart of methods that characterize the management of procedures in the countries of origin of the adversarial legal system.[245] The doctrine was implemented in the rules of civil procedure of England and Wales, and in practice was applied via procedures that made possible mediation and arbitration as an integral part of the legal system.[246] The approach that was considered an

[241] This doctrine concerns legal procedure, rather than matters of substantive law. *Id. See also* Rodriguez Ferrere, *supra* note 226, at 109.

[242] *See* WOOLF, *supra* note 33; Michalik, *supra* note 95, at 152–58.

[243] For more on the shift and change of the paradigm, see Rabeea Assy, *Briggs's Online Court and the Need for a Paradigm Shift*, 36 CIV. JUST. Q. 93, 100 (2017).

[244] *See generally id*. (highlighting the importance of substantive law and access to justice).

[245] *See id*. Also see provisions on the civil procedure law of England and Wales, which include, inter alia, the following: "encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure" and "helping the parties to settle the whole or part of the case." CPR, RULES & PRACTICE DIRECTIONS, 1.4(e)–(f). *See also* WOOLF, *supra* note 33, §§ 2, 5, 6 (1995); Elizabeth G. Thornberg, *Reaping What We Sow: Anti-Litigation Rhetoric, Limited Budgets and Declining Support for Civil Courts*, 30 CIV. JUST. Q. 74 (2011).

[246] Michalik, *supra* note 95, at 152–55.

alternative up until that point instantly became the principal route to conflict resolution.

Following the Woolf reform, courts have reorganized so that the actual management of the legal case has become incidental, whereas the primary objective of preliminary procedures is to bring the parties to consent to fair compromise.[247] In this new role, the judge becomes an involved and active participant in this process.[248] Various reform boards have recommended that rules of civil procedure be adapted to suit this transformation.[249] Among other changes, the reform brought forward the pre-action protocols, adapted to different types of lawsuits, which oblige the parties to examine the alternatives to litigation as opposed to the risks and probabilities concerning a possible legal outcome.[250] This preliminary preparation was intended to allow the parties to reach, at a very early stage, grounded conclusions and insights that would lead them to an appropriate and suitable settlement. The rules that required early preparation of informed negotiation were accompanied by new authority that allowed the judge to impose sanctions during litigation on parties that failed to fulfill the demands of the rules of civil procedure. The role of the judge under these rules begins even before the case has started. As manager, the judge has the authority to lead parties to prepare in the best way possible for the negotiation process.[251] Among other advantages, this procedure spares the parties the need to turn to the court with various requests concerning discovery. At later stages, again according to the recommendations of the Woolf committee, the parties are required to appear before the court in pretrial conferences and directions hearings, during which the judge will verify with the parties and their attorneys that the various options of settling the case are known to them. Preliminary hearings concerning the costs of litigation, also known as cost hearings, illustrate for the parties the high costs involved in litigation, thus creating another incentive to reach a settlement. There is another unique mechanism of cost shifting, according to which a party that has refused a settlement offer (which is not revealed before the judge) will have to incur all of the legal costs if the court ruling at the end of litigation is close to the settlement offer.[252] These procedures are unique in that they reduce the parties' control over the process, reduce the level of adversarial rivalry, and incentivize cooperation between the parties.

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[247] CATHERINE ELLIOT & FRANCES QUINN, ENGLISH LEGAL SYSTEM 511–17 (10th ed. 2009).

[248] Michalik, *supra* note 95, ¶ 4.5.2.

[249] ELLIOT & QUINN, *supra* note 247, at 516.

[250] WOOLF, *supra* note 33, at 107; Susan Moloney, *A New Approach to Civil Litigation? The Implementation of the "Woolf Reforms" and Judicial Case Management*, 2 JUD. STUD. INST. J. 98, 101 (2001).

[251] Michalik, *supra* note 95, at 164.

[252] *See* discussion and sources cited *supra* note 79.

Nevertheless, they do not make the judge more active in promoting settlement, but rather promote settlement through the rules of civil procedure and the managerial interface of the court system.

V. CONFLICT RESOLUTION PROCEDURES IN THE INQUISITORIAL SYSTEM

A. The Deficiency of the Judicial Sphere Under the Inquisitorial Tradition

The adversarial judge has extensive leeway with regard to the integration of inquisitorial-like techniques for the management of negotiation and the promotion of settlement. This leeway is supplemented by broad judicial discretion that characterizes common law systems. In contrast, the continental judge is positioned within a relatively confined space with regards to the management of procedure and the range of discretion in the application of the law. The truth-seeking process in the inquisitorial system is not divided into stages and is linked to an active investigation not regulated through procedural rules that leave room for incidental creativity. Even in applying the law, the judge is perceived as the legislature's mouthpiece and does not leave an individual mark on his rulings. Thus, his rulings are perceived as a formal application of the law, lacking discretion. In the absence of procedural leeway on the formal level, a judge's ability to apply conflict-resolution approaches is limited to the that of specific rules and calls for little creative involvement.[253] Still, there are widespread developments in legislation, which allow judges within this tradition, and sometimes even obligate them, to conduct conflict-resolution procedures before the trial begins.[254] In other words, continental judges may apply a specific rule in order to promote settlement, and may also employ practices they were trained to use, which have been adopted through legislation. Nevertheless, it is unreasonable to expect spontaneous developments of these practices, as one occasionally finds in adversarial systems.

The inquisitorial judge learns of the details of the conflict at hand via what the parties choose to present in writing. Even though judges maintain the authority to hold oral hearings and to conduct direct dialogue with the parties, they rarely do so.[255] This creates a formal and strict dynamic, one that makes it difficult to form the desired discourse for examining each parties' essential interests, the roots of the conflict, the possible paths towards its consented resolution, and other elements required in order to help the parties reach the non-legal insights from which agreement may be reached. When the legal

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[253] As to the law applied in France, see Cadiet, *supra* note 77, at 318 n.101, § 7.5, at 323–24.

[254] Sergio Chiarloni, *Civil Justice and its Paradoxes: An Italian Perspective*, *in* CIVIL JUSTICE IN CRISIS, *supra* note 32, at 280–86.

[255] Cadiet, *supra* note 77, ¶ 3.4, at 300.

code offers detailed rules against the backdrop of a strict obligation to rely only on those rules in finding a solution, the development of informal thinking becomes impossible.

It appears that even when the continental legal system examines possibilities for assimilating conflict-resolution procedures as an integral part of the legal process, this shift does not carry over to a reform of the judicial role. Italy, which has made great progress in assimilating conflict-resolution procedures both within and outside of the court system, still enforces strict legal criteria concerning the character, skills, and experience of the judge-to-be. A proposed reform relates to the judge's ability to write reasoned decisions, to understand the relevant code, and their ability to end as many cases as possible in judgment. The reform does not propose examining the personality of judges-to-be or focusing on the interpersonal and emotional qualifications that may serve them in bringing parties to settle.[256]

The formal sphere of the civil law code system inherently places barriers with respect to the possibility of open dialogue; the judges, bound by ruling practices not founded on personification of the conflict, face difficulties in adapting when they are asked to resolve conflicts in new ways rather than through traditional adjudication. In addition, that the judge is directly exposed to informal conversation between the parties, as well as possible admissions on their behalf, might raise the parties' concerns that what they say during this stage may impact the judge's final ruling if efforts to reach a settlement fail.[257] Such concerns diminish the parties' cooperation with settlement efforts of the court which, in turn, harms the judge's ability to bring them to a consented resolution. Unlike the parties' perception of the judge in common law systems—where the parties expect and experience significant involvement of the court, to the extent that such involvement is the norm—the parties in continental legal systems expect very low, or even no, involvement of judges.[258] Therefore, active participation of the judge directed towards settlement, or statements made by judges based on interests rather than being investigative or procedural in nature, may arouse distrust in the process itself and, accordingly, result in lack of cooperation. This stands in contrast to the form of dialogue that would take place within a common law courtroom.

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[256] Chiarloni, *supra* note 254, at 280–86.

[257] *See supra* note 16 for a criticism in this respect.

[258] *See supra* note 253. *See also* Tania Sourdin, *Five Reasons Why Judges Should Conduct Settlement Conferences*, 37 MONASH U.L. REV. 145, 145–48 (describing the Australian experience).

B. The Incorporation of Conflict Resolution Procedures Within the Inquisitorial Legal System

Alongside the institutionalization of mediation as an integral part of the adversarial legal system in common law countries,[259] changes have also occurred in the perception of alternative dispute resolution procedures under the inquisitorial tradition in continental countries.[260] The hybrid framework enables a wider and more diverse spectrum for the application of ADR tools as an outgrowth of, among other factors, the manner in which each tradition has undergone change and revolution. While in common law systems the evolution of conflict-resolution procedures has been gradual, consistent, and is integrated into the sources upon which the system itself relies, including court rulings, legal scholarship, and public committees,[261] the integration of such procedures in the civil code countries has been approached through codification and explicit legislation.[262] Legal procedures such as the inherent powers

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[259] Cortés, *supra* note 79, at 56.

[260] *See* Alberstein & Zimerman, *supra* note 23. On the development of ADR in Germany, see Peter Gottwald, *Civil Justice Reform: Access, Cost, and Expedition. The German Perspective*, *in* CIVIL JUSTICE IN CRISIS, *supra* note 32, § 3.3, at 220–22, 230–32. On the situation in Italy, see Chiarloni, *supra* note 254, at 288–90. *See also* Rina Bogoch & Ruth Halperin Kaddari, *Hakol Kol Hagishur, ach Hayadaim Yedei Hamisphat: al Hagishur veal Nihul Girushin Beisrael* [*The Voice is the Voice of Mediation, But the Hands are the Hands of the Law: Of Mediation and the Management of Divorce in Israel*], 49 HAPRAKLIT 293 (2007) (Isr.). It is noted, however, that this is a process in the making, and a practice of compromise is yet to be incorporated into the procedural law of many countries that implement the civil code system. *See* Cortés, *supra* note 79, at 59.

[261] Menkel-Meadow, *supra* note 6; ALBERSTEIN, THE THEORY OF MEDIATION, *supra* note 35, at 95–106.

[262] *See generally* Valentina Popova, *The Mediation in the Bulgarian and European Law, Bulgarian, European and International Civil Process*, 9 CIV. PROC. REV. 43, 44–48 (2018). The Romanian legal system underwent a broad-ranging reform under which procedural rules were revised, including mediation proceedings, in the spirit of the novel EU legislation. For a general review of Romanian law and the civil-code fundamentals thereof, see Anamaria Corbescu, *UPDATE: Doing Legal Research in Romania*, GLOBALEX, §§ 1.1, 1.2, 1.3, 5.4, 6 (Feb. 2017), http://www.nyulawglobal.org/globalex/Romania1.html. Romanian law applies the principles of mediation and judicial review on the settlement in a detailed manner, inter alia, by Law No 192/2006, which imposes restrictions on the issues with respect to which the parties are unable to enter into a mediation settlement, outlines the content and form of mediation settlements, and sets out provisions with respect to the judicial review which the courts are required to apply to mediation settlements and the boundaries of such review. The legal system of Belarus has undergone a significant change in this context. As of January 2014, the Mediation Law took effect, which required changes to the preexisting codification that had been followed by the courts of Belarus. For further details, see *Belarus*, 23 REV. CENT. & E. EUR. L. 393 (1997); Tatyana Khodosevich & Nadia Shalygina, *UPDATE: Legal Research in Belarus*, GLOBALEX (Oct. 2013), http://www.nyulawglobal.org/globalex/Belarus1.html. The instructions with respect to the

of the court, for example, which in practice include an elaboration of judges' discretion, require specific legislation, without which judges have no ability to employ them.[263]

The ideas included in the European Directive[264] provide the legal grounds integrated in all European countries.[265] One can find, therefore, similar, and even identical, characteristics in state legislation dealing with referral to out-of-court mediation procedures, and only in limited cases integration of mediation within the courtroom, which entails regulative change in the role of judges. Accordingly, there has been a change in the perception of many countries—such as France, Spain, Italy, Germany, Romania, Belarus, and others—which have created local legislation that includes assimilation of the ideology of compromise.[266] In France, for example, the judge is allowed—based on the

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form of the discourse between the judge and the mediator are incorporated into the economic and general code, as is the manner of enforcement of mediation settlements and the powers of the court to intervene therein. Economic Procedural Code of the Republic of Belarus, No. 219-Z of December 15, 1998 [amended as of Jan. 5, 2016]; Code of Civil Procedure of the Republic of Belarus, No. 238-Z of January 11, 1999 [as amended on May 27, 2021].

[263] Jessica Liang, *The Inherent Jurisdiction and Inherent Powers of International Criminal Courts and Tribunals: An Appraisal of Their Application*, 15 NEW CRIM. L. REV. 375, 378–80 (2012).

[264] *See* Directive 2008/52, *supra* note 17 (laying out the prototype for extensive national legislation). The Directive concerns certain aspects of mediation on civil and commercial matters and addresses an alternative dispute resolution proceeding for disputes arising between residents of different countries. The Directive instructs the countries to ensure the enforcement of mediation settlements, thereby establishing mediation as a significant and stable alternative. It denies the right to enter into a mediation settlement as pertains to the waiver of inalienable rights, with respect to which it leaves the court to function as the gatekeeper. In other words, from the outset, the Directive qualifies the freedom to enter into a settlement on certain terms and conditions, and presumably noncompliance therewith will require judicial intervention. However, the Directive does not specify the type and extent of judicial intervention and the criteria for application thereof in each and every case. *Id.*

[265] *See* Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 Concerning the Distance Marketing of Consumer Financial Services, 90/619/EEC, art. 15, 2002 O.J. (L271); Directive 2008/52, *supra* note 17.

[266] An empirical study conducted in 2012 in dozens of countries that follow the civil code system found that judicial mediation by the judge is the most limited dispute resolution process compared with other processes for compromise, and thus, while 27 countries hold a mediation process adjacent to the courts; 35 countries hold a vast active private mediation procedure; 30 countries support mediations conducted by and through various authorities; and only 17 countries allow for the conduct of mediation by judges, whether by way of internal rules integrated with regulations or by leaving the full discretion on the conduct of a procedure for compromise with the judges themselves. *See* EUR. COMM'N FOR THE EFFICIENCY OF JUST., REPORT ON "EUROPEAN JUDICIAL SYSTEMS – EDITION 2014 (2012 DATA): EFFICIENCY AND QUALITY OF JUSTICE" 150–51 (2014), http://www.just.ro/wp-content/uploads/2015/09/editia-2014-en.pdf.

parties' request—to make a ruling based on the code in accordance with considerations of justice (or "amiable compositeur").[267] The judge must always prefer a method of settling interests by using mediation. Procedural or contractual justice procedures, which are not necessarily in accordance with the legal truth that emerges from the investigation of relevant facts, have steered the French legal system toward a dynamic of judicial mediation. Deviating from the aspiration for truth toward a broader investigation of interests and objectives has led France to a clear preference for conflict-resolution procedures as the primary course for resolving cases, rather than adjudication based on inquisitorial, legal investigation.

In Spain, mediating procedures have been set for cases that deal with both international trade and local lawsuits.[268] The law does not create mandatory mediation, but it incentivizes parties to choose a way of compromise. It does so using the following tools: increasing the costs of litigation; funding mediation through legal aid; halting the period of limitation for the duration of mediation procedure; guaranteeing complete confidentiality of the mediation procedure from the judge and the procedure;[269] delaying the legal process until mediation ends;[270] and finally, turning the court into an active participant in the process of mediation, as the court approves the mediation agreement and gives it the validity of a court ruling.[271]

The Italian Civil Procedure Code has integrated several new tools that allow judges to promote settlement in cases brought before them.[272] Among other possibilities, a judge may request that the parties appear in a hearing to be questioned freely, with the purpose of reaching a settlement.[273] This is contrary to the existing norm in Italy where hearings are usually held only in the presence of lawyers.[274] Furthermore, the following rules have been introduced into the civil procedure code: in hearings before the justice of the peace (i.e., small claims) in which the parties are not present, the lawyers are required to have authorization to agree to a settlement;[275] until the end of the preliminary stage, the parties themselves can ask the judge to conduct free investigation

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[267] Art. 12, ¶ 1, New Civil Procedural Code (Fr.). *See* Cadiet, *supra* note 77, § 7.5, at 323–24.

[268] Law on Mediation § 1, B.O.E. 2012, 5 (Spain) (incorporating into Spanish Law the European Parliament and Council Directive 2008/52/EC, on Certain Aspects of Mediation in Civil and Commercial Matters).

[269] *See id*. at art. 9.

[270] *See id*. at art. 4.

[271] Aura Esther Vilalta & Rosa Pérez Martell, *Overview of the New Normative on Mediation in Spain*, 6 AM. J. MEDIATION 9 (2012).

[272] *See generally* Alberstein & Zimerman, *supra* note 23, at 301–03.

[273] Alberstein & Zimerman, *supra* note 23, at 301. *See also* Art. 185, Italian Civil Procedural Code (C.p.c.).

[274] Alberstein & Zimerman, *supra* note 23, at 301.

[275] Art. 317, Italian Civil Procedural Code (C.p.c.).

in an attempt to settle the case;[276] the judge is allowed to present to the parties a settlement offer during any stage of the legal process, including during appeal[277] or, alternatively, to issue a detailed, binding mediation order in cases she believes are suitable for mediation.[278] It seems that in practice, Italian judges do not use these practices very often and, therefore, any change in the Italian legal tradition is markedly slow and gradual.[279] Nonetheless, in particular courts in Italy, judges collaborate with mediation experts and academics to promote settlement. In these courts, one can identify an increase in the rate of settlements and in the number of cases that are referred to out-of-court mediation.[280]

In addition, one of the central reforms the Italian legal system has undergone during recent years, in an attempt to deal with significant delays in the courts, is the introduction of mandatory mediation.[281] This legislation sets mandatory mediation prior to the beginning of civil litigation in many types of cases. It also introduces cost-related incentives so that, if a party refused a mediation proposal and receives a judgment at the end of litigation that is worse than what was offered in mediation, that party must pay the costs of the other party as well as a special fine.[282] Unlike similar legislation that has been passed in Ireland, with the purpose of reducing the cost of litigation,[283] the purpose of the Italian rule, according to the legislature, is to save judicial time and help shorten legal procedures.[284] While judges are allowed to promote settlement within the courtroom, in practice, they tend to outsource by referring parties to out-of-court mediators.[285]

In Germany, the legislature introduced the authority of the mediating judge into the code as well as to the rules of ethics for judges. During the deliberations over the Mediation Act, efforts were made to include the authority of the mediating judge, but the final draft that was eventually approved did not

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[276] *Id*. at art. 185.

[277] *Id*. at art. 185bis.

[278] *See* Alberstein & Zimerman, *supra* note 23, at 302.

[279] Giuseppe De Palo & Lauren Keller, *Mediation in Italy: Alternative Dispute Resolution for All*, *in* MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE 669, 687 (Klaus J. Hopt & Felix Steffek eds., 2012).

[280] *Id*. at 679, 680, 692.

[281] Arts. 13–14 Decreto Legislativo 4 marzo 2010, n.28, G.U. May 3, 2010, n.53 (It.).

[282] De Palo & Keller, *supra* note 279, at 676–77.

[283] § 2(2)(b) Mediation Act 2017 (Act No. 27/2017) (Ir.) ("[T]he need for the expeditious resolution of such disputes in a manner that minimises the costs of resolving those disputes for the parties concerned.").

[284] Giuliana Romualdi, *Problem-Solving Justice and Alternative Dispute Resolution in the Italian Legal Context*, 14 UTRECHT L. REV. 52, 52–63 (2018). *See also* Paula Moreschini & Gabrielle Saltzberg, *Mediation Goes Mainstream in Italy*, INT'L DISP. RESOL. NEWS 2 n.4 (2012).

[285] Alberstein & Zimerman, *supra* note 23, at 301.

include this.[286] And so, while the Mediation Act relates to out-of-court mediation only, the authority of judges as mediators have been integrated into the rules of procedure.[287] Judicial mediation had proved itself in several states in Germany; over 70% of the cases in which judges acted as mediators ended in a settlement.[288] The judge who advances settlement is defined in the rules of procedure as a conciliation judge in order to, among other reasons, differentiate her from the mediator, who deals with conflict resolution in the private sector.[289] Yet this definition does not prevent judges from employing mediation-like procedures[290] in working towards conflict resolution, including legal evaluation and prediction as well as referral to arbitration. As of January 2013, all civil courts in Germany, including unique settings such as social or administrative courts, employ conciliation judges whose powers are fixed in section 278(5) of the Civil Procedure Code.[291] In the absence of unified rules for the training of conciliation judges alongside the integration of mediation procedures in the federal courts, mediation-conciliation procedures in the different states differ from one another. Still, these procedures do share common characteristics, including: the conciliation judge is trained as a mediator; these judges are not allowed to rule on the cases in which they mediate; judges may draft and edit settlement agreements; third parties who feel affected by the settlement agreement can choose to join it; the conciliation procedure is always accompanied by the parties' attorneys and judges are not allowed to conciliate in a case where there are unrepresented parties; conciliation procedures are confidential, voluntary, and are not open to the public; there is no unification regarding how the parties consent to the process and each state has its own consent rules; judicial conciliation does not entail special court fees; judges are allowed—as a unique working tool—to offer the parties a

[286] Anne-Ruth Moltmann-Willisch, *Judges in Mediation in Germany. How Would a Judge Become an Excellent Mediator?*, 2 AKV EURÓPAI SZEMLE [EUR. REV. ALT. CONFLICT MGMT. & DISP. RESOL.] 78, 78–79 (2018).

[287] *Id.*; Mediationsgesetz, MediationsG [Mediation Act], July 21, 2012, BUNDESGESETZBLATT [BGBL] at 1577 (Ger.) (incorporating the provisions of the EU Directive (EG2008)). The law was revised in 2017. Section 1 defines the mediation proceeding, Section 2 prescribes the objectives of the mediator, whereas the other sections concern the issues of confidentiality and training of the mediator.

[288] Moltmann-Willisch, *supra* note 286, at 78–81.

[289] Zivilprozessordnung [ZPO] [Code of Civil Procedure], § 278, para. 5 (Ger.) ("The court may refer the parties for the conciliation hearing, as well as for further attempts at resolving the dispute, to a judge delegated for this purpose, who is not authorized to take a decision (Güterichter/conciliation judge). The conciliation judge may avail himself of all methods of conflict resolution, including mediation.").

[290] Moltmann-Willisch, *supra* note 286, at 79–80.

[291] Zivilprozessordnung [ZPO] [Code of Civil Procedure], § 278, para. 5 (Ger.).

settlement that is not a binding ruling but rather bears contractual status and implications only.[292]

While there is no precise definition of which cases are suitable for mediation, more than a third of the cases in the Berlin Court of Appeals that deal with construction-related issues[293] enter mediation. Similarly, cases involving public authorities are often referred to mediation.[294] The parties themselves can request to participate in judicial conciliation and even choose the identity of the conciliation judge. The conciliation procedure may take place during any stage of the legal procedure, and even after many years of litigation.[295]

The perception of the conciliation judge in Germany is particularly interesting given the qualities that the judge undertakes in moving from ruling judge to conciliating judge. For example, the conciliation judge is required to possess the ability to change strict rules, to shift from "positive neutrality" to the state of "equally subjective."[296] This setting drives the parties closer together and creates the desired relationship from which consent to a settlement may evolve.[297] The judge must display honesty and authenticity in his proposals and show empathy and sincere concern for the parties' interests, including those that are therapeutic and extra-legal.[298] It seems that the semantics of the definition of the judge as conciliator rather than mediator has no significance to the practice of the German judge as conflict resolver.[299]

Legislated on May 5, 2006 and effective as of June 29, 2013, Romanian Law No.192 applies the principles of mediation and judicial review of settlement agreements in a detailed arrangement.[300] The law requires that the

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[292] Moltmann-Willisch, *supra* note 286, at 80.

[293] *Id*. at 81. In Berlin, judicial mediation proceedings are conducted for 600-700 cases per year in all civil instances (3%–5% of all cases), 500 of which are at the court of appeals. Since 2009, 70% of these cases have ended in a settlement. *Id.*

[294] *Id.* at 80–81.

[295] *Id*.

[296] *Id*. at 83. *See generally* Ronit Zamir, *Mitos Hanetraliut shel Hamegasher: Meei Maso Panim Lenesihat Panim Shava* [*The Myth of the Mediator's Neutrality: From Impartiality to Equal Partiality*], 16 L. & BUS. 411 (2014) (Isr.).

[297] *See* Moltmann-Willisch, *supra* note 286, at 83.

[298] *See id*.

[299] A review of the practice that developed in Germany indicates that, while the definition in the law refers to conciliation, the judge's actions are not limited or routed to the narrow channel of dispute resolution. *Id.* at 80; *see also* Thomas Trenczek & Serge Loode, *Mediation "Made in Germany": A Quality Product*, 23.1 AUSTRALASIAN DISP. RESOL. J. 61, 62 (2012).

[300] Law 192/2006 on Mediation and the Organization of the Mediator Profession published in the Official Gazette no.441/22.05.2006 (Rom.) (including through amendment extensive legislation on mediation, including Law 370/2009 (Rom.); Ordinance 13/2010 Measures to Encourage Creation of New Jobs and Reduction of Unemployment published in the Official Gazette no.136/01.03.2010 (Rom.); Law 202/2010 Family Code published in the Official Gazette no.174.26.10.2010 (Rom.); Law 76/2012 on the Implementation of

mediator will present the parties the procedure of mediation and its advantages.[301] Initially, the law stated that if a party should refuse to participate in this preliminary meeting the court may dismiss the lawsuit entirely.[302] This legislation was held unconstitutional in a later decision of the Romanian constitutional court.[303] Yet there is no legislation that authorizes judges to mediate in the courtroom, nor are there rules that encourage judges to try and settle the cases before them by ways other than traditional judicial ruling.

In Belarus, as of January 2014, a mediation law is in effect which entails changes to the existing code based on which general and financial courts were operating.[304] Article 170 of the Economic Code allows judges to explain to the parties, during preparation for trial, that they have the right to turn to a mediator—a completely voluntary procedure.[305] The dialogue and ongoing coordination between the court and the mediation process are much more extensive relative to the norm under common law legal systems, and the instructions concerning the nature of dialogue between the judge and the mediator are integrated into the code. The parties have the right to turn to mediation only before the court has started dealing with the case on the merits, during the preliminary hearing.[306] If they turn to mediation, the court rules that so long as the mediation procedure is in progress, the court will not issue a final opinion,[307] and the tax authority returns the fully paid state fee to the parties.[308] The law in Belarus, which encourages the initial connection between the court and mediation procedures—in a controlled way—determines the manner of

Law no.134/2014 on the Civil Procedure Code published in the Official Gazette no.76/25.5.2012 (Rom.); Law 115/2012 (Rom.); Emergency Ordinance 90/2012 (Rom.); Emergency Ordinance 4/2013; Law 214/2013 (Rom.); Emergency Ordinance 80/2013 (Rom.)).

[301] Art. 29, Law 192/2006 on Mediation and the Organization of the Mediator Profession published in the Official Gazette no.441/22.05.2006 (Rom.).

[302] Christian-Radu Chereji & Constantin-Adi Gavrilă, *Don't Rush*, WOLTERS KLUWER: KLUWER MEDIATION BLOG (Mar. 2, 2015), http://mediationblog.kluwerarbitration.com/2015/03/02/dont-rush/; Law 115/2012 (Rom.); Emergency Ordinance 90/2012 (Rom.).

[303] Chereji & Gavrilă, *supra* note 302; Curtea Constituțională a României [Constitutional Court of Romania], Decision No. 266 of May 7, 2014 (Rom.).

[304] *See generally* Economic Procedural Code of the Republic of Belarus, No. 219-Z of December 15, 1998 [amended as of Jan. 5, 2016]; Code of Civil Procedure of the Republic of Belarus, No. 238-Z of January 11, 1999 [as amended on May 27, 2021].

[305] Economic Procedural Code of the Republic of Belarus, art. 170, No. 219-Z of December 15, 1998 [amended as of Jan. 5, 2016].

[306] *Id.* at art. 40-1; *see also* Law on Mediation of the Republic of Belarus, art. 11, No 58-Z of July 12, 2013 [amended as of Jan. 5, 2016].

[307] Economic Procedural Code of the Republic of Belarus, art. 40-1, No. 219-Z of December 15, 1998 [amended as of Jan. 5, 2016].

[308] Tax Code of the Republic of Belarus (Special Part), art. 292, ¶ 2.5, No. 71-Z of December 29, 2009 [amended as of Dec. 31, 2021].

enforcing the mediation agreement when a party to mediation does not fulfill his obligations under the agreement. The party who upholds the agreement has the right to turn to the Economic Court and request a validation document that mandates the full execution of the mediation agreement.[309] Nevertheless, along with the deepening of the perception of out-of-court mediation procedures, and the cooperation of the courts with such procedures in general, the code is silent with regards to judges' own authority to conduct conflict resolution procedures within the courtroom. In that respect, the Belarusian code sets very clear boundaries as to what is allowed and what is forbidden within the courtroom, thus maintaining the traditional role of the judge.

It is evident, then, that dispute-resolution procedures have been integrated in the legislation of numerous countries acting within the inquisitorial tradition, both by way of outsourcing, organizational collaboration with the court system, and within the courts themselves. Subsequently, judges in these systems are exposed to dispute resolution techniques and witness forms of dialogue not previously known to them, vis-à-vis external mediators. This is not a trivial development, since dispute-resolution procedures have lengthened the time needed to resolve cases, and one of the central characteristics of the inquisitorial legal system is the fast and purposeful resolution of legal conflicts.[310] Furthermore, the very referral of cases to mediation and the cooperation between the courts and alternative-procedure providers reflects a

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[309] Economic Procedural Code of the Republic of Belarus arts. 40-1, 262-1, No. 219-Z of December 15, 1998 [amended as of Jan. 5, 2016]; Alexandra Habriyanchik, *Concerning Highlights of Mediation Agreements Execution in Belarus*, 22 BIAŁOSTOCKIE STUDIA PRAWNICZE 273, 277–78 (2017). The motion will be filed within six months of the expiration of the obligation performance period clause specified in the settlement itself, and it shall be heard by the court within one month of its receipt. *Id.* at art. 259.

[310] Whereas referral to mediation in common law countries is intended, inter alia, to reduce the system's workload and lessen the expectancy and duration of litigation, in civil law the use of mediation proceedings delays the judicial ruling which, were it not for the referral to mediation, would be concluded within the space of several months. In Germany, for example, an average duration of first instance proceedings is between 8–11 months. Jochen Lehmann & Markus Andrees, *Germany*, *in* LITIGATION & DISPUTE RESOLUTION LAWS AND REGULATIONS 2022, GLI: GLOBAL LEGAL INSIGHTS, https://www.globallegalinsights.com/practice-areas/litigation-and-dispute-resolution-laws-and-regulations/germany. In Belarus, civil cases at first instances shall be considered no later than two months from the date of submission the application to the court, Code of Civil Procedure of the Republic of Belarus, art. 158, No. 238-3 of January 11, 1999 (amended as of May 27, 2021), and one month in economic cases in the relevant circumstances, Economic Procedural Code of the Republic of Belarus, art. 175, No. 219-3 of December 15, 1998 (amended as of July 25, 2021). The court may suspend the proceedings if the parties conclude a written agreement on the application of mediation, Code of Civil Procedure of the Republic of Belarus, art. 160, No. 238-3 of January 11, 1999 (amended as of May 27, 2021); Economic Procedural Code of the Republic of Belarus, arts. 40-1, ¶ 2 & 152, No. 219-3 of December 15, 1998 (amended as of July 25, 2021).

concession regarding the traditional role of the judge as one who manages the litigation in practice and actively works to seek the truth needed for the determination of the case. Moving legal disputes to dialogic, consensual processes that are completely managed by the parties themselves reflects a conceptual shift that should not be underestimated.

VI. SHIFTING THE CENTER OF GRAVITY OF THE ADVERSARIAL PROCEDURE: FROM FULL ADJUDICATION TO DETERMINATION DURING PRETRIAL

The expansion of the authority of judges during pretrial within adversarial legal systems,[311] judges' inquisitorial-like involvement during this stage, the number of pretrial hearings, the great significance of early discovery procedures, the determination of disagreements, and early statements of the parties—all of these have shifted the balance of the adversarial legal procedure. The center of gravity, traditionally grounded in the evidentiary stage, has shifted to the preliminary stages.[312] New procedures and regulations have allowed the parties to internalize early on their actual legal standing and recognize the court's position regarding the chances of finding in their favor. This, in turn, incentivizes parties to reach agreements during pretrial, in light of early predictions.[313] The expansion of discovery, as well as the minimal intervention of appellate courts in rulings concerning discovery, have changed litigants' perceptions concerning the possibility of attributing greater weight to interim decisions during later stages of litigation. Appellate courts, therefore, in their refusal to frequently or widely interfere with decisions having to do with early stages of litigation, have played a role in shifting the center of gravity of the legal process to its earlier stages.

This shift in the center of the adversarial legal procedure into its early stages was grounded in a procedural bind. On the one hand, the rules of civil procedure, both in the United States and in Israel, have broadened judges' authority in courts of first instance to determine milestones from which the probable outcome of the case can be inferred during its early stages. On the other hand, the causes of intervention of appellate courts in such decisions were limited. This procedural bind has accelerated decision-making during the early stages of disputes and has led to a somewhat contradictory phenomenon: the increased certainty regarding final expected judicial rulings, a result of preliminary rulings, had led parties to settle, as opposed to the prior legal

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[311] The New Civil Procedure Regulations underscore the managerial function of the active judge, inter alia, for the purpose of leading the parties to a settlement as early as in the first pretrial hearing. § 63B(17), New Civil Procedure Regulations, *supra* note 15.

[312] *See* ROSEN-ZVI, *supra* note 21.

[313] Yeazell, *supra* note 23, at 639 ("[T]hese judicial decisions provide a framework within which the parties decide how to evaluate settlement or abandonment of the underlying lawsuits.").

reality in which the uncertainty regarding the final outcome served as an incentive to reach agreement and settle cases.

The shift of the center of gravity in the process has necessarily led to several changes in the behavior of parties in managing litigation: litigants include evidence and argue a full argument during the preliminary stages of litigation; pleadings are made as to provide the judge with openings for mediating the case; expert opinions are attached to the statement of claims, and the parties do not wait to submit opposing expert opinions or affidavits; many litigants hire lawyers who specialize in negotiation early in trials and lawyers who specialize in managing litigation when mediation fails; and the judge arrives at the first hearing already proficient in all details of the case and prepared to learn from the parties the remaining details required to resolve the case in an informed manner that suits the parties' interests. In this respect, it should be noted that dividing the payment of court fees into two stages assists the parties in deciding to end the case through resolution, knowing that the fees they have paid will be returned even during the late stages of litigation. The shifting of the center of gravity has created a new realm of decision-making, one that is based on juridical grounds and acknowledgement of the realm of uncertainty which brings with it a complete set of novel and creative possibilities.

VII. CONCLUSION

Modern courts developed along two central legal traditions, the adversarial and the inquisitorial. These traditions clearly express different attitudes towards the relation between consent and authority and between dispute resolution and legal determination according to the law. The gradual blurring of boundaries between these two traditions, and the reciprocal stimulation between them, along with various reforms in adversarial legal systems that led to out-of-court dispute resolution, all gave rise to the development of new judicial practices that focus on the resolution of disputes through settlement and consent.

In this Article, we examined these practices from a comparative perspective. We have shown how in a particular context of an adversarial legal system—with certain inquisitorial powers and an informal platform—one may find the necessary conditions for the development of rich judicial conflict-resolution activity. In another context, one in which an inquisitorial legal system assimilates conflict-resolution processes into the court system, this application will most likely remain formal and will only be minimally expressed in judges' self-perception of their professional roles. The degree and nature of judicial conflict-resolution activity will be impacted, therefore, by the essence of the legal system as well as the managerial reforms that have been conducted within it. In addition, we have shown how in adversarial systems, the legal procedure does not "vanish" but rather retreats to the preliminary stages of the

process and is expressed in rich judicial activity of judges during pretrial hearings and throughout the process. Such judicial activity, which relies on the inquisitorial tools reviewed in this Article, is aimed at finding middle-ground solutions which balance the formal rules with additional considerations. Judges who operate within such a framework can include in their decision-making processes intricate considerations and act, in effect, as regulators and problem solvers.

Managerial reforms, such as the one presented in the Israel's new procedural rules,[314] may alter the balance and narrow the realm of judicial intervention when the attempt to resolve the dispute is based on directing cases to out-of-court mediation or, alternatively, on the collection of information that will impact the out-of-court negotiation towards settlement. The new realm of the adversarial, conflict-resolving judge who continues to rule on cases that have not otherwise reached a resolution (despite various incentives) is a unique arena. In this evolving sphere, judges can solve disputes under the auspices of their judicial authority in a manner that extends beyond technique or formal application. This conceptual shift in the definition of the role of judges goes hand in hand with the shift in adversarial procedures whereby parties focus their evidentiary efforts on presenting the full picture that supports their version at early stages of the process, with the expectation that the pretrial hearing will be utilized by the judge to provide settlement offers. The development of this sphere bears great potential for the resolution of complex conflicts and for the development of new hybrid models in both law and mediation.

[314] *See supra* Part IV(C)(i).