THE MANAGER-JUDGE AND THE JUDGE-MANAGER: TOWARDS MANAGERIAL JURISPRUDENCE IN CIVIL PROCEDURE

DORON MENASHE*

ABSTRACT

For a long time, the overriding principle of judicial systems has been exposing the truth in conflicts. This principle is perceived as a guiding principle both by the adversarial system of justice and by the inquisitorial judicial system, where every legal system seeks to expose the truth in a different way. This Article presents a different concept that should guide the courts when they discuss disputes: managerial jurisprudence. According to this principle, a judge is a manager and case law is case management. The emphasis in managerial jurisprudence is legal efficiency, based on the understanding that parties arriving at the court are less interested in deontological justice than they are in settling the conflict and finding a specific solution as quickly as possible. Therefore, the author suggests that the examination of the effectiveness of civil procedure rules should be done using standards of management rather than standards designed only to expose the truth. This will enable the streamlining of civil proceedings and create interface with other areas of law, where efficiency is already a dominant instrument for assessing legal provisions. In addition, the author will demonstrate how managerial jurisprudence constitutes a proper response for Alternative Dispute Resolution. In other words, managerial jurisprudence will be able to promote both efficiency and justice fairly, since justice must also be administered.

---

*† Doron Menashe, Associate Professor, Faculty of Law, University of Haifa, Israel. The author would like to thank Professor Gabriel Hallevy for his insightful ideas and comments; Inbal Av, Omer Av, and Inbar Cohen worked on an earlier version of this Article and improved it considerably.

I. INTRODUCTION

The main goal of any judicial proceeding is to expose the ultimate truth.[1] Courts that fail to expose the truth fail to serve justice because justice is a normative reflection of truth.[2] Legal justice, then, is the application of existing norms to true material facts. However, one should consider whether this purpose is still the main goal of judicial proceedings in recent times. The answer is still in dispute, both in academia and practice. Courts all around the globe are extended to their limits under the ever-growing pursuit of justice.[3] "The fact that some litigants may expect the legal system to address their claims for years on end demonstrates that whatever justice is offered in the current system, it is left wanting."[4] There is no doubt that the time has come to look for innovative solutions.[5]

The main argument in this Article is that changing the target of civil procedure from exposing the truth to managing the case would allow for greater efficiency in civil proceedings. Therefore, the judge should be seen as a manager. Judicial skills are managerial skills. Judging a case is managing a case. In all legal systems around the world, civil cases are brought before the court in order to be managed by the court.[6] Very often both parties of the civil case prefer a satisfactory solution and are not necessarily concerned with exposing the truth or realizing deontological justice.[7] If so, why should civil procedure be assessed through standards which are aimed for exposing the truth and not through standards of managerial efficiency? Moreover, is it necessary to examine these two different standards as fun-

---

1. *See* C.H. VAN RHEE & A. UZELAC, TRUTH AND EFFICIENCY IN CIVIL LITIGATION: FUNDAMENTAL ASPECTS OF FACT-FINDING AND EVIDENCE-MAKING IN A COMPARATIVE CONTEXT xxiii (2012).

2. Ray Finkelstein, *The Adversarial System and the Search for Truth*, 37 MONASH U. L. REV. 135, 135–45 (2011); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1032–40 (1975).

3. P.M. LANGBROEK & M. FABRI, THE CHALLENGE OF CHANGE FOR JUDICIAL SYSTEMS: DEVELOPING A PUBLIC ADMINISTRATION PERSPECTIVE 93–150 (2001).

4. Doron Menashe, *A Critical Analysis of the Online Court*, 39 U. PA. J. INT'L L. 921, 933 (2018); *see also* Harry T. Edwards, *The Rising Work Load and Perceived 'Bureaucracy' of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 871–77 (1983).

5. Menashe, *supra* note 4, at 932.

6. *See* Steven Flanders, *Blind Umpires – A Response to Professor Resnik*, 35 HASTINGS L.J. 505, 505–07 (1984). *See generally* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1983) [hereinafter Resnik, *Managerial Judges*].

7. Thomas G. Gutheil et al., *"The Whole Truth" Versus "The Admissible Truth": An Ethics Dilemma for Expert Witnesses*, 31 J. AM. ACAD. PSYCHIATRY & L. 422, 422 (2003).

damentally opposed to one another? Surely, one of the managerial efficiency evaluation parameters should be the ability to expose the truth.[8]

How is the difference in these two types of assessment expressed in the praxis of civil cases in courts across the globe? For instance, take a typical pretrial session, in which the court determines what the exact factual controversies are between the parties. Due to the judge's experience, the judge has noticed that a very important controversy is missing in the documents of both parties.[9] When asked about the missing issue, the parties argue that at this point the issue would be very uncomfortable to expose in court for both parties. What should civil procedure say to that judge?

When civil procedure is loyal to the value of exposing the truth, the comfort of both parties becomes secondary and perhaps unimportant. Accordingly, the judge would have to force the parties to expose the information in their possession. As a result, both parties would probably find a preferable solution in Alternative Dispute Resolution ("ADR"), such as through arbitration or mediation. This would demonstrate some despair with the judicial system because the parties will have to find comfort in its substitutes. These parties will have lost some of their trust in the existing judicial system and resolving disputes in court will have lost its attraction.[10]

Nevertheless, how many judges and legal systems around the world would prefer that inefficient outcome? If assessed through managerial standards, this kind of rule is horrible inductively. And if efficiency is a goal of legal systems—as it undoubtedly is—then all civil procedure rules should be assessed through managerial standards.

In this Article, the author will try to settle two allegedly opposing criteria for evaluating a judge's managerial quality: exposing the truth versus efficiency.[11] In the author's opinion, civil procedure rules should be aimed for optimal case management, whereas exposing the truth should not be the only goal.[12] Considering the utilitarian approach, exposing the truth is only

---

8. Shimon Shetreet, *The Administration of Justice: Practical Problems, Value Conflicts and Changing Concepts*, 13 BRIT. COLUM. L. REV. 52, 79 (1979).

9. INT'L CRIMINAL COURT, RULES OF PROCEDURE AND EVIDENCE ch. 2, 4 (2013); Harry Gershenson, *Pre-Trial Procedure*, 26 WASH. U. L. REV. 348, 348–55 (1941).

10. Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 170–85, 189–90 (2003); Jacqueline Nolan-Haley, *Mediation: The "New Arbitration"*, 17 HARV. NEGOT. L. REV. 61, 61–62, 87–88 (2012).

11. Finkelstein, *supra* note 2, at 135–45.

12. *See* Stephen Goldstein, *The Influences of Constitutional Principles on Civil Procedures in Israel*, 17 ISR. L. REV. 467, 467–69 (1982).

one parameter for the judge's managerial assessment.[13] Moreover, this is an a priori parameter, and it should thus be referred to equally.[14] If there is a contradiction between these parameters when exposing the truth, this will result in high expenses for both sides, and the court will need to find an equilibrium.[15]

Part II defines the concepts of efficiency and management. The author will discuss and present the importance of clear definitions and examine other disciplines' definitions. Part III focuses on the change in the objectives of civil procedure: from exposing the truth to managing the case. Part IV deals with the management of civil law. Finally, in Part V, the principles of administrative jurisprudence are applied using the characteristics of alternative dispute resolution procedures.

II. EFFICIENCY AND MANAGEMENT DEFINITIONS

There is an ever-growing need for considering the judicial system's efficiency, both academically and publicly. To promote this goal, changes and reforms of fundamental laws and judgment have been suggested.[16] Only time can tell whether efficiency has been achieved and whether an equilibrium between efficiency and justice has been obtained.[17] However, before elaborating on this conflict, proper definitions of the terms "efficiency" and "management," in agreement with the judge's duty as the court's manager, should be established.[18]

Efficiency from the engineering point of view is described as how much product is obtained from a specific amount of raw materials.[19] According to Judge Richard Posner, "efficiency" means maximizing "consumer willingness to pay for goods."[20] Other authors have defined the term us-

---

13. *See generally* Frank E. A. Sander, *The Obsession with Settlement Rates*, 11 NEGOT. J. 329 (1995).

14. Shetreet, *supra* note 8, at 78–80.

15. The author will not consider all purposes of procedural laws, such as those aimed to gain equality, objectivity, publicity, etc. This Article is limited to considering only the main values of exposing the truth and efficiency, which are relevant for this discussion. For further reading please refer to Goldstein, *supra* note 12, at 467–70.

16. Michal Agmon-Gonnen, *Judicial Independence: The Threat from Within*, 10 HAMISHPAT L. REV. 213, 213 (2005).

17. *See* Sander, *supra* note 13, at 330–32.

18. Yair Shilo, *Rejected Justice Is Better Than No Justice*, ALEI MISHPAT C 317, 317–30 (2003).

19. WARREN L. MCCABE, JULIAN C. SMITH & PETER HARRIOTT, UNIT OPERATIONS OF CHEMICAL ENGINEERING ch. 1 (Kiran Verma et al. eds., 4th ed. 1985).

20. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 4 (1st ed. 1973) [hereinafter POSNER, ECONOMIC ANALYSIS OF LAW].

ing the more conventional economic "Pareto efficiency" concept.[21] However, what is efficiency in the legal context?

There may be several different definitions of legal efficiency. In this Article, though, the meaning of legal efficiency will be "the longer the reaction time, the less efficient it becomes." In an extreme situation, the reaction time can be so long that the remedy given is no longer important. Another example occurs when the circumstances have changed so dramatically that the requested remedy is not suitable to the prevailing legal considerations and the material facts that gave rise to those considerations.[22]

This concept of legal efficacy can be conceptualized through cybernetic theory. According to cyber law, adaptation to change is a "feedback in a closed loop with negative feedback."[23] In other words, flow of information, execution of orders according to the information received, and follow-up of the closed-loop execution. Just as a person washing his hands at the water tap adjusts the opening of the tap to increase or decrease the water pressure, the legal system must provide relief before the relevant circumstances change, or alternatively adapt the legal process to the changing reality of these circumstances.

Therefore, in the context of legal efficiency we must ask: what is the frequency of the reaction of the legal process? The premise of this Article is that judicial effectiveness in legal proceedings takes place as long as the time required to end the conflict is greater than the time needed to respond to and reform the judicial system.[24]

The difference between two similar concepts must be clarified: efficiency versus effectiveness. According to Adizes' theory for modern management,[25] effectiveness is pursuing the results needed; thus, the focus is on the outcome. However, efficiency is performing multiple tasks with minimum time wasted; thus, the focus is on the process. Although some similarity exists between the two terms, the terms differ from one another. While

---

21. LEWIS KORNHAUSER, THE ECONOMIC ANALYSIS OF LAW (Edward N. Zalta ed. 2017), https://plato.stanford.edu/entries/legal-econanalysis/.

22. It should be emphasized that it is immaterial whether the time of the prevention is due to a prevention initiative or is derived from a mere change of circumstances that is not initiated by an interested party. *See generally* Doron Menashe & E. Goren, *A Cybernetic Model for Evaluating the Efficiency of Judicial Proceedings*, 14 FLA. A & M U. L. REV. (forthcoming 2019). *Cf. generally* David S. Clark & John Henry Merryman, *Measuring the Duration of Judicial and Administrative Proceedings*, 75 MICH. L. REV. 89 (1976).

23. *See generally id.*

24. *See supra* note 22 and accompanying text.

25. MCCABE ET AL., *supra* note 19, at 1.

effectiveness is examined over the long-term, efficiency is examined in the short-term.[26]

The term "legal efficiency" alone does not suffice for the purposes of this Article. The term "management" should also be examined. Usually the literature depicts a manager as a person who plans, decides, organizes, supervises, and leads.[27] This description can be consistent with the judge's conduct as a central and determining element in the trial. According to Adize's theory, four managerial styles arise:

> 1. Producer (P) – Focus on achieving the most effective results in a brief period.
>
> 2. Administrator (A) – Focus on processing effective tasks in a brief period to minimize waste.
>
> 3. Entrepreneur (E) – Focus on achieving effective results over an extended period while examining new opportunities and development routes.
>
> 4. Integrator (I) – Focus on processing effective tasks over a prolonged period.[28]

According to this methodology, and to obtain good decisions, a combination of all four styles is mandatory. The result from the combined styles is the most effective and efficient for both brief and prolonged durations. This model also emphasizes that most people exhibit a partial combination of the four styles. Some people also develop skills in all four styles. However, it is impossible to exhibit equal abilities in all four, and so primary and secondary styles are prominent.[29] This method is appropriate both for individuals and organizations.[30] If so, this discipline should be examined for use in the legal system and, in particular, in courtrooms for judges.

However, some of the objectors to this method[31] warn against applying business administration principles to judicial management, public administration, political science, and organization theory.[32] According to the ob-

---

26. ICHAK KALDERON ADIZES, HOW TO SOLVE THE MISMANAGEMENT CRISIS 13–36 (1979).

27. *See* ICHAK KALDERON ADIZES, MANAGEMENT/MISMANAGEMENT STYLES: HOW TO IDENTIFY A STYLE AND WHAT TO DO ABOUT IT 24 (2004).

28. Ichak Kalderon Adizes, *Understanding Management Styles*, http://adizes.com/management_styles/ (last visited Dec. 13, 2018).

29. *See* ADIZES, *supra* note 26, at 13–36.

30. For supplementary information regarding these four styles, see *supra* notes 26–28.

31. *See generally* Resnik, *Managerial Judges*, *supra* note 6. *See also* Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 494–96 (1986).

32. *See generally* Sander, *supra* note 13.

jectors, these four topics are applicable for organizations that possess mutual goals. They argue that since the legal system and the parties that flow through that legal system usually aim toward different goals, this method should not be applied. Moreover, when studying the relationship between the prosecutor and defendant, one can easily identify an adversarial conflict between them since they have clearly divergent interests.

In addition, the objectors claim that the lack of clear rules and interfering in the independent judicial process will lead to loss of the public's trust.[33] The author accepts this claim that standardization of management is a mandatory demand. Even so, this does not prevent an exploration of the managerial qualities of judges as part of a larger effort to improve the efficiency of the judicial system.

III. CHANGING TARGETS OF THE CIVIL PROCEDURE RULES: FROM EXPOSING THE TRUTH TO MANAGING THE CASE

In this Part, the principles of "efficiency" and "exposing the truth" will be examined in the adversarial legal system vis-à-vis the inquisitorial legal system. This examination will be done by focusing on the civil procedure rules used in each system. Exposing the truth is an important component in both legal systems, which at times can result in theoretical and practical dispute, especially when efficiency is added to the equation.[34]

The author claims that there is no contradiction between efficiency and exposing the truth. Both legal systems are studied because the value of exposing the truth is not the ultimate purpose of judicial procedures, but rather an interim goal for justice between the parties, which, according to the utilitarian approach, will constitute a criterion for assessing the quality of the judge's work as a manager.[35] Usually, literature in the area of civil procedure focuses on the difference between the adversarial legal system and the method of inquisitorial law in relation to the value of "exposing the truth."[36]

---

33. *See id.* at 125–26; *see also* Shimon Shetreet, *Basic Principles of the Reform: Thoughts of the Judicial System Image in the Future Based on the Study of the Present Problems*, 8 MECHKAREI MISHPAT 59 (1999).

34. POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 20, at 4–6.

35. Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 253–60 (1985); Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770, 770–71, 781 (1981); Kafayat Motilewa Quadri et al., *Adquisitorial: The Mixing of Two Legal Systems*, 3 INT'L J. HUMAN. & MGMT. SCI. 31, 33–34 (2015).

36. Janet Ainsworth, *Legal Discourse and Legal Narratives: Adversarial versus Inquisitorial Models*, 2 LANGUAGE & L. 1, 1–7 (2015); Stephen LaTour, *Determinations of Participant and Observer Satisfaction with Adversary and Inquisitorial Modes of Adjudication*, 36 J.

The system that is considered better at exposing the truth through its procedures is automatically considered the better system.[37]

The adversary system is based on the concept that the parties to the legal proceeding should be the dominant actors of the play. According to this view, giving the power to the parties is the most appropriate way to express the liberty and autonomy of the parties and allow them to protect their self-interests. The court is exposed to the widest factual episode which envelops the specific case. As a result, cross-examination in the adversary system is regarded as one of the most efficient instruments for exposing the truth.[38] The adversary system regards the inquisitorial system as paternalistic for the parties, which harms the exposure of truth.[39]

Conversely, the inquisitorial system is based on the concept that the court itself should be the dominant actor of the play. Giving the power to the court, which is neutral and objective, ensures that no bias will be involved in exposing the truth. The parties have interests which may disturb the court from exposing the truth. Thus, individual interests in the inquisitorial system are not welcome. The opponents of the inquisitorial system point out its weakness, which is the undesirability of direct government intervention in a private case.[40] Such an intervention is not necessarily objective. Moreover, they point out the lack of party self-autonomy, in which the court disregards their interests.[41]

PERSONALITY & SOC. PSYCHOL. 1531, 1531–42 (1978); Francesco Parisi, *Rent-Seeking Through Litigation: Adversarial and Inquisitorial Systems Compared*, 22 INT'L REV. L. & ECON. 193, 193–97 (2002); Ellen E. Sward, *Values, Ideology, and the Evolution of the Adverary System*, 64 IND. L.J. 301, 302, 304–05, 316–17 (1989).

37. *See* JOHN A. JOLOWICZ, ADVERSARIAL AND INQUISITORIAL APPROACHES TO CIVIL LITIGATION 175–82 (James Crawford et al. eds., 2000) [hereinafter JOLOWICZ, ADVERSARIAL AND INQUISITORIAL APPROACHES]; Mauro Cappelletti, *Social and Political Aspects of Civil Procedure: Reforms and Trends in Western and Eastern Europe*, 69 MICH. L. REV. 847, 847–50 (1971); Geoffrey C. Hazard Jr. et al., *Introduction to the Principles and Rules of Transnational Civil Procedure*, 33 N.Y.U. J. INT'L L. & POL. 769, 772–73 (2001); Robert S. Summers, *Evaluating and Improving Legal Processes: "A Plea for Process Values"*, 60 CORNELL L. REV. 1 (1974).

38. Richard Eggleston, *What Is Wrong with the Adversary System?*, 49 AUSTRALIAN L.J. 428, 428–31 (1975); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 35 (1984); A. A. S. Zuckerman, *Quality and Economy in Civil Procedure: The Case for Commuting Correct Judgments for Timely Judgments*, 14 OXFORD J. LEGAL STUD. 353, 363 (1994).

39. JOLOWICZ, ADVERSARIAL AND INQUISITORIAL APPROACHES, *supra* note 37, at 175–82.

40. *Id.*; Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 12–15 (1996).

41. Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*, 8 BUFF. CRIM. L. REV. 165, 200 (2004); Kenneth E. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937, 938 (1975); KONSTANTINOS D. KERAMEUS, TOWARDS A EUROPEAN CIVIL CODE 145–56 (3d ed. 2004).

As previously mentioned, these procedural systems are examined through their respective abilities to expose the truth. Since the legal truth may vary from the factual truth, the standard of that examination is, in fact, how close the legal truth is to the factual truth in each of the different procedural systems. As mentioned, when exposing the truth in one procedural system is more powerful, it has traditionally been considered a better system.[42] But have we ever asked ourselves if this is still the main principle of the legal process?

Analyzing the research in civil procedure from recent years indicates that the standard of exposing the truth, and sometimes the target of exposing the truth, has become weaker in both procedural systems, which is reflected in an increase in the number of disputes that end in compromise.[43] As a result of the increasing weight given to efficiency as a legitimate standard of examination in the civil law, it seems that the examination of procedure through its ability to expose the truth alone should also come to an end. A new standard emerges. According to this standard, civil procedure is no different than any other managerial instrument.[44]

The utilitarian approach has a different perspective on this discussion. According to this approach, the principle that should guide the judge is the closure of the conflict while finding a specific solution according to the relevant civil procedure rules. Other principles, as described above, become secondary. For instance, the questions of which procedural system reflects parties' individualism and self-autonomy better, or which procedural system better exposes the truth, are considered as secondary to the primary managerial question.[45]

The primary question is taken from the terminology of case management, as inspired by the Woolf report at the end of the twentieth century in Great Britain.[46] The Woolf report called for a wide reform in civil proce-

---

42. William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 703–06, 712–14 (1989); Thomas Weigend, *Is the Criminal Process About Truth?: A German Perspective*, 26 HARV. J.L. & PUB. POL'Y 157, 157–61 (2003).

43. *See* Jonathan D. Glater, *Study Finds Settling Is Better than Going to Trial*, N.Y. TIMES (Aug. 8, 2008), https://www nytimes.com/2008/08/08/business/08law html.; *How Courts Work*, A.B.A. (Dec. 2, 2013), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/cases_settling html.

44. Bernard C. Cairns, *Management of Litigation and the Adversary System*, 12 QUEENSL. LAW. 143, 143–45 (1992); Bernard C. Cairns, *Managing Civil Litigation: An Australian Adoption of American Experience*, 13 CIV. JUST. Q. 50, 50–55 (1994).

45. *See* Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 103–105 (1979); *cf.* Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 511 (1980).

46. Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 675 (2010).

dure on the basis of efficiency, while using the concepts and understandings of the discipline of management as a source for inspiration. Along with the rise of the efficiency discourse in jurisprudence as a global trend,[47] efficiency considerations have entered the sphere of evaluation of civil procedure rules.[48]

The prism of efficiency and justice as one unified target has already become the motive of amendments to some existing civil procedure rules. Any future amendment should be examined, accordingly, through their contribution to the efficiency of the judicial system. This change in discourse should also motivate changes in the prism of examination.[49] It is unnecessary to classify the amendments into adversarial or inquisitorial amendments, as amendments have traditionally been classified. Instead, amendments should be reoriented and examined within the management discipline, which becomes the most relevant discipline to civil procedure. Thus, the goals of civil procedure shift from exposing the truth to efficient management of the trial, with exposing the truth as one of the measures that will ultimately assess the quality of the judge's managerial capabilities.[50]

The next Part will focus on a different perspective, claiming that managerial jurisprudence permits civil procedure to exhibit both functions of procedural efficiency and exposing the truth. Thus, they are both necessary for resolving the conflict rather than inherently at odds with one another.

---

47. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 564–66 (6th ed. 2003); *see also* Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 399–404 (1973).

48. JACK I. H. JACOB, THE FABRIC OF ENGLISH CIVIL JUSTICE 1–10 (38th ed. 1987); Michael E. Stamp, Comment, *Are the Woolf Reforms an Antidote for the Cost Disease? The Problem of the Increasing Cost of Litigation and English Attempts at a Solution*, 22 U. PA. J. INT'L ECON. L. 349, 354, 360 (2001).

49. WORLD BANK, DOING BUSINESS 2014: UNDERSTANDING REGULATIONS FOR SMALL AND MEDIUM-SIZE ENTERPRISES 67–70 (2014); Alice Kaswan, *Reconciling Justice and Efficiency: Integrating Environmental Justice into Domestic Cap-and-Trade Programs for Controlling Greenhouse Gases*, *in* ETHICS & GLOB. CLIMATE CHANGE 232, 233–35 (Denis G. Arnold ed., 2011); Resnik, *Managerial Judges*, *supra* note 6, at 386–413.

50. E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 328–33 (1986); Chief Justice James Allsop, An Invitation to Speak at the Lord Dyson Lecture on "The Jackson Reforms to Civil Justice in the UK" Hosted by University of South Wales: Judicial Case Management and the Problem of Costs (Sept. 2014).

IV. MANAGERIAL JURISPRUDENCE IN CIVIL PROCEDURE – EXPOSING THE TRUTH AND PROCEDURAL EFFICIENCY

A. INTEGRATION OF DIFFERENT LEGAL PRINCIPLES THROUGH THE ADMINISTRATIVE LEGAL SYSTEM

The acute question, at this point, is what exactly the meaning of "managing" the case is, and whether it might be considered a new jurisprudential theory in civil procedure – "*managerial jurisprudence in civil procedure*."[51] Managerial jurisprudence is based on social science and business administration theories rather than on legal concepts. If management becomes an integral part of civil procedure, the legal profession will become less exclusive, at least in relation to civil procedure. Unfortunately, these disciplines are not taught in law schools, but in business schools. In the first stages of the legal realm being exposed to management disciplines, legal scholars are trying to create managerial methods that are relevant for civil cases.[52]

Some may criticize managerial jurisprudence in civil procedure as a system that resembles the inquisitorial system, since managing the case is done through a case manager, which happens to be the judge. This is not precise. The inquisitorial procedural system regards the intervention of the judge as a legal instrument for achieving the classic target of exposing the truth, and not as a managerial instrument for case closure. The managerial instrument, on the other hand, may be exposing the truth, but this is not its primary target.[53] For example, when a litigant tries to reopen a decided case, a conflict between the litigant's legal rights and the finality of the previously closed case arises.[54] Thus, managerial jurisprudence should identify the opposing interests and try to find an equilibrium between them, with the understanding that exposing the truth is one goal, but not necessarily the dominant goal, in the legal process.

One of the significant effects of managerial jurisprudence in civil procedure is that it takes into account not only the specific parties involved in

---

51. *See* articles cited *supra* note 6.

52. John A. Jolowicz, *The Woolf Report and the Adversary System*, 15 CIV. JUST. Q. 198, 198–201 (1996); Ian R. Scott, *"Access to Justice": Lord Woolf's Final Report*, 15 CIV. JUST. Q. 273, 273–74 (1996); Michael Zander, *The Woolf Report: Forwards and Backwards for the New Lord Chancellor*, 16 CIV. JUST. Q. 208, 208–10 (1997).

53. Paul Collins, *Clarity in Pleadings in the Light of the Woolf Report*, CLARITY, April 1998, at 2; William W. Schwarzer, *Case Management in the Federal Courts*, 15 CIV. JUST. Q. 141, 141–45 (1996); Keith Uff, *"Access to Justice": Lord Woolf's Final Report, Procedure and Evidence*, 16 CIV. JUST. Q. 17, 17–26 (1997).

54. Peter D. Marshall, *A Comparative Analysis of the Right to Appeal*, 22 DUKE J. COMP. & INT'L L. 1, 1–4 (2011).

the civil case, but the whole society and the whole public as affected by the specific decision. According to this concept of management, this perspective is an intertwined tools system.[55] Most legal systems realize that a procedural decision has a wide significance beyond the specific parties in a specific dispute. A local decision on postponing a court session due to a request of one of the parties also has significance on the continuity of all parties in all civil cases.[56] This might be analogous to the "butterfly effect," the principle being that one decision may be very significant to many other decisions, and one decision in relation to one party may be significant to all parties, including potential parties, which have not submitted their claims to the court. Of course, there are hundreds and thousands of each type of decision every day in every legal system, and therefore the aggregate has tremendous significance for the entire legal system.[57]

The managerial approach examines the basic understandings and concepts of all types of procedural systems, including both adversarial and inquisitorial procedural systems.[58] Hence, the managerial approach may even create a synthesis of some existing procedural systems, which reflects the concept of managerial understanding. Furthermore, managerial jurisprudence sees no conflict between procedural justice and efficiency. The choice should not be between a just civil process and an efficient civil process. Managerial jurisprudence combines them both.[59] Indeed, one of the most significant concepts of managerial jurisprudence is the rejection of the "or" and the acceptance of the "and." A research from Stanford University showed that corporations which embraced the "and" and rejected the "or" have succeeded far beyond others and their success lasted for much more

55. *See* Dick Greenslade, *Objections to Woolf*, 146 NEW L.J. 1252, 1252–55 (1996); Michael Zander, *Essays on the Woolf Report – Part 1*, 145 NEW L.J. 1866, 1866–68 (1995). *See generally* Michael Zander, *Essays on the Woolf Report – Part 2*, 146 NEW L.J. 29 (1996).

56. *See Introduction*, *in* PAUL M. PERELL, STARE DECISIS AND TECHNIQUES OF LEGAL REASONING AND LEGAL ARGUMENT (1987).

57. Clifford J. Wallace, *Judicial Administration in a System of Independents: A Tribe with Only Chiefs*, 1978 BYU L. REV. 39, 50 (1978); *see also* CHRISTOPH RENNIG, *Subjective Procedural Justice and Civil Procedure*, *in* PROCEDURAL JUSTICE 207, 207 (Klaus F. Rohl and Stefan Machura eds., 1997).

58. Elliottt, *supra* note 50, at 326. *See generally* Resnik, *Managerial Judges*, *supra* note 6.

59. David L. Bazelon, *New Gods for Old: "Efficient" Courts in a Democratic Society*, 46 N.Y.U. L. REV. 653, 654–56 (1971); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1281–83 (1976); John Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 580–85 (1984).

time.[60] Therefore, managerial jurisprudence strives for not justice *or* efficiency, but justice *and* efficiency.[61]

B. IMPLEMENTATION OF ADMINISTRATIVE JURISPRUDENCE IN THE FIELD OF CIVIL PROCEDURE

The question might be, how can managerial jurisprudence become significant in the ongoing praxis of civil cases? There are some amendments that might be derived from managerial jurisprudence, which include creation of exclusive paths of case closure while maintaining a balance between the efficiency of the legal process and the exposure of truth. The following examples will demonstrate civil procedure concepts that already integrate the managerial approach and expand on the possibilities for changing existing rules according to the managerial approach.

1. *Creation of Exclusive Paths of Case Closure*

According to administrative jurisprudence, there is justification for the legal system trying to classify different treatment for different types of cases. For example, according to this approach, simple cases involving only factual clarification and/or claims for low amounts should be sent through an expedited process, which is not procedurally meticulous. Thus, a quick and efficient decision is reached in the dispute between the litigants while reducing the costs involved in managing the case, and without harming justice between the parties as to the "simple" conflicts between them.[62] Examples of special procedures can be found nowadays in small claims tribunals and accelerated legal procedures.[63] Such paths reduce the burden on the civil courts.[64]

---

60. Resnik, *Managerial Judges*, *supra* note 6, at 395, 398–99.

61. JAMES COLLINS & JERRY PORRAS, BUILT TO LAST: SUCCESSFUL HABITS OF VISIONARY COMPANIES 1–12 (2004); Bazelon, *supra* note 59, at 653.

62. *See, e.g.*, U.K. Civ. R. & Prac, Part 3; Ronny Linder-Ganz, *Small Claims, Little Justice*, HAARETZ (Jan. 6, 2006, 2:24 AM), https://www haaretz.com/1.4910344.

63. *See supra* Part III.

64. In recent years, many countries have introduced a series of reforms in their civil procedure rules aimed at streamlining civil litigation. A significant change took place in England and had an impact on other countries such as the U.S. and Israel. In 1996, the committee's final report on the civil litigation system in England was published. The report proposed a change in the rules of law in England, which were reflected in the Civil Procedure Rules of 1998. Among other things, the report proposed to route claims to various treatment tracks, mainly according to the value of the claim. The three treatment tracks offered were: small claim, fast track and multi-track, and development of alternative dispute resolution methods. *See* SIR HARRY WOOLF, ACCESS TO JUSTICE: THE FINAL REPORT TO THE LORD CHANCELLOR OF THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES 16–71 (2d ed. 1996) [hereinafter ACCESS TO JUSTICE]; LORD CHANCELLOR, LORD CHIEF JUSTICE & SENIOR PRESIDENT OF TRIBUNALS, MINISTRY OF JUSTICE,

2. *Creating Procedures in Order to Streamline and Reduce Judicial Proceedings*

The parties' dispute may also be addressed through alternative dispute resolution paths, such as arbitration or mediation, managed by the court or by officers of the court.[65] Imposing mediation on the parties prior to trial or during trial at specific junctures can reduce the number of cases addressed in court and create long-term justice between the parties. Another example is pretrial procedure, prior to the presentation of evidence and witness testimony, where parties disclose their disputes. The pretrial stage helps to reduce and clearly define the boundaries of the conflicted topics that need to be resolved at trial. These procedures can also suggest a quick case resolution before trial begins once the parties have a better understanding of the disputed issues.[66] In addition, developing internal systems to route cases through the courts to the appropriate resolution may advance much more efficient solutions for submitted cases.[67]

3. *Institutional Claims on the Basis of Explicit Evidentiary Material May Minimize the Necessity of Regular Defense Documentation*

In some legal systems, there is a procedure that bars the defendant from having the automatic right to challenge certain aspects of the plaintiff's case unless there is explicit evidence of the defense.[68] In Israel, such a legal process opens when the amount of the claim does not exceed NIS 75,000. The procedure is designed to clarify relatively simple factual and legal claims with efficiency and a comparatively small amount of resources. Arguably, accelerated legal procedures such as these come at the expense of exposing the truth because the defendant has no vested right to defend himself. How-

---

TRANSFORMING OUR JUSTICE SYSTEM 10–11 (2016). In 1998, a law was passed in the United States to promote programs and apply alternative procedures to the adversarial judicial process. *See* Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (codified as amended at 28 U.S.C. §§ 651–658 (2012)).

65. Hensler, *supra* note 10, at 170–90.

66. For example, in 2016, Israel issued a mandatory obligation for couples going through a divorce to partake in four mediation sessions prior to filing for divorce in court. Prior to the mediation requirement, duplicate cases were frequently submitted to both civil and Rabbinical courts, which dramatically increased the burden on the judicial system. The purpose of the mediation requirement was to reduce the amount of divorce cases and trials in both courts.

67. *See, e.g.*, Orna Rabinovich-Einy & Ethan Katsh, *The New New Courts*, 67 AM. U. L. REV. 165, 191, 195 (2017); *Job Announcement: Case Administrator I*, UNITED STATES DIST. COURT FOR THE W. DIST. OF PA., (Apr. 8, 2016), http://www.pawd.uscourts.gov/sites/pawd/files/announce_case_administrator_16_1_CL24.pdf.

68. *See* ACCESS TO JUSTICE, *supra* note 64, at 16–71; ISR. CIV. P. REG. 214.

ever, according to the civil procedure rules in Israel today, the court can still grant the defendant the ability to defend him or herself in appropriate circumstances (such as in a situation of factual ambiguity), so that the balance between effectiveness and truth inquiry is maintained.[69]

4. *Imposition of Wide Duties of Exposing Evidentiary Material on Both Parties*

Attaching the evidentiary material supporting a claim with the complaint, and attaching it to subsequent defense documents, would enable the parties and the court draw out the exact controversies from the earliest moments of the pretrial proceedings. "Exposing your cards" prior to trial may prevent the use of inappropriate techniques and the imposition of unfair pressure on the other side, and prevent the delay of proceedings by the surprised party (in order to contradict the information raised against it).[70] This duty would be accompanied with discovery sanctions that could include a variety of penalties, with the most severe being that no additional evidentiary material could be submitted to the court.[71] Wider discovery in an earlier stage of the litigation enables the court to manage the trial much more efficiently and may also shed more light on the truth.[72]

5. *Harmonizing Temporal Remedies*

Harmonization of temporal—sometimes referred to as provisional or prejudgment—remedies in the civil procedure rules is also required in order to maximize their efficiency, unity, and equality, both for the benefit of society and for litigants. Prejudgment remedies, although limited because they do not carry a determination with the effect of *res judicata*, can nevertheless sometimes be misused by parties so that a final judgment is never needed, throwing the scales of justice off balance.[73] The lack of harmonization, with an emphasis on the fact that some temporal remedies are easier to obtain than others, may be manipulated by one party to block the counterparty's

---

69. *Id.*

70. *See* Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435, 435–37 (1994); *see also Disclosure and Privilege*, OUT-LAW, https://www.out-law.com/topics/dispute-resolution-and-litigation/disclosure-electronic-disclosure-and-document-review/disclosure-and-privilege/ (last updated Apr. 2013).

71. *See* ISR. CIV. P. REG. 114, 122A; Charles B. Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CALIF. L. REV. 264, 268 (1979).

72. ACCESS TO JUSTICE, *supra* note 64, at 105.

73. FED. R. CIV. P. 64–71; *see also* Gerry Maher & Barry J. Rodger, *Provisional and Protective Remedies: The British Experience of the Brussels Convention*, 48 INT'L & COMP. L.Q. 302, 302 (1999).

access to a full and fair proceeding at a premature stage of the litigation.[74] Moreover, the lack of appropriate legislation for these procedures being conducted daily in the courts is likely to yield different results due to different considerations among judges. This situation is undesirable because it harms judicial certainty and predictability and leads erosion of the public's trust in the courts. Regularization of the temporal remedies through legislation can prevent that, setting clear rules for both parties and the court for the terms to obtain provisional remedies.[75] Therefore, this process is essential as part of the legal-management approach.

6. *Adjustment of the Right to Access Civil Law to the Needs and Interests of Society*

Very often, an unlimited and unrestricted right to access the civil law is focused on the plaintiff and neglects the defendant. When plaintiffs are unrestricted in accessing the court, many innocent defendants are brought before the court with no proper justification.[76] Some countries' legal systems require the plaintiff to deposit collateral or a guarantee to prevent vain and meritless claims.[77] These systems purport to balance the right of access to the courts with penalties for cases that have been filed in bad faith. Thus, the right to approach should be adjusted to the relevant society under the standards of efficiency and justice for the society as a whole and for the individual parties.[78]

7. *Improving Judicial Efficiency by Incorporating Technological Systems*

Managerial jurisprudence encourages the incorporation of technology into the court system for improving judicial procedures. This trend is ever-growing, allowing courts to more efficiently handle, manage, and control the flow and disposition of cases.[79] In Israel, for example, a computerized administrative law system, "NET HAMISHPAT," was developed. Using this system, litigators can commence legal proceedings, submit depositions and other evidence, etc. A similar computer system was developed in the

---

74. ISR. CIV. P. REG. 28. *Cf. generally* Philippe Signore, *The New Provisional Rights Provision*, 82 J. PAT. & TRADEMARK OFF. SOC'Y 742 (2000).

75. STUART SIME, A PRACTICAL APPROACH TO CIVIL PROCEDURE 62–78 (5th ed. 2002).

76. HECTOR FIX-FIERRO, COURTS, JUSTICE, AND EFFICIENCY: A SOCIO-LEGAL STUDY OF ECONOMIC RATIONALITY 8–16 (2003).

77. *See* 31 U.S.C. §§ 3729–3733 (2012).

78. ISR. CIV. P. REG. 114, 122A; Renfrew, *supra* note 71, at 71–74.

79. James E. Cabral et al., *Using Technology to Enhance Access to Justice*, 26 HARV. J.L. & TECH. 241, 256 (2012). *See generally* Rabinovich-Einy & Katsh, *supra* note 67.

United Kingdom, where a small claim can be submitted online.[80] Moreover, many courtrooms in the United States have incorporated CCTVs, microphones, Wi-Fi, and other technological systems, allowing video conferencing with witnesses.[81] A similar program has recently begun as a pilot in some courtrooms in Israel.[82]

Such progress will only increase as time advances. For example, in a few years it seems possible, even likely, that a trial will be performed without the physical presence of the parties in a courtroom. Parties could someday simply argue via online courts.[83] The examples described above show that throughout history courts have adopted changes which have now laid the foundations for managerial jurisprudence. The next chapter will demonstrate the advantages of applying ADR rules to managerial jurisprudence.

V. APPLYING ALTERNATIVE DISPUTE RESOLUTION RULES TO MANAGERIAL JURISPRUDENCE

In civil cases, alternative frameworks exist for resolving disputes out of court. This approach is the outcome of the rising philosophy of ADR – Alternative Dispute Resolution. This philosophy has become increasingly common since the 1970s.[84] Such frameworks may take the form of arbitration, mediation, compromise settlements, etc. The use of alternative methods of conflict resolution in many instances has the effect of transferring the burden of finding a solution to the parties themselves.[85]

---

80. NET HAMISHPAT, https://www.court.gov.il/ngcs.web.site/homepage.aspx (last visited Dec. 20, 2018).

81. *See, e.g.*, Lin Walker, *Courtroom 23 Orange County Florida*, COURT TECH. BULL. (Spring 1999), https://ncsc.contentdm.oclc.org/digital/collection/tech/id/603/.

82. Orna Rabinovich-Einy, *Beyond Efficiency: The Transformation of Courts Through Technology*, 12 UCLA J.L. & TECH. 1, 17, 30–32 (2008).

83. Evidence of this trend is the budding thinking that has developed over the transfer of judgment in certain procedures to the Internet. Recently, a model was proposed for the establishment of a first court of its kind in England, where the process of filing the suit and the judgment will be conducted on an Internet site to be established for this purpose. *See* LORD JUSTICE BRIGGS, JUDICIARY OF ENG. & WALES, CIVIL COURTS STRUCTURE REVIEW: FINAL REPORT, 48–49 (2016). A similar model was also proposed in Michigan. *See generally* Lucille M Ponte, *The Michigan Cyber Court: A Bold Experiment in the Development of the First Public Virtual Courthouse*, 4 N.C. J.L. & TECH. 51 (2002).

84. *See* CARRIE J. MENKEL-MEADOW ET AL., DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL 34–40 (2005); Gabriel Hallevy, *Is ADR (Alternative Dispute Resolution) Philosophy Relevant to Criminal Justice? – Plea Bargains as Mediation Process between the Accused and the Prosecution*, 5 ORIGINAL L. REV. 1 (2009); Gabriel Hallevy, *The Defense Attorney as Mediator in Plea Bargains*, 9 PEPP. DISP. RESOL. L.J. 495, 496 (2009).

85. Thomas R. McCoy, *The Sophisticated Consumer's Guide to Alternative Dispute Resolution Techniques: What You Should Expect (or Demand) from ADR Services*, 26 U. MEM. L. REV. 975, 977–83 (1996).

Transferring the responsibility for resolving a dispute to the parties themselves amounts to a "privatization" of the traditional legal process conducted in court, since what is actually happening is the transfer of a public service provided by a public institution to private hands.[86] The public service in this instance is the service of resolving disputes in a peaceful way, the public body entrusted with the task is the court, and the private hands are those of the parties who have taken upon themselves the responsibility of resolving the legal dispute between them.

As a result of managerial jurisprudence, the characteristics of alternative dispute resolution procedures seeped into some aspects of the civil procedure rules in the judicial system. This change is reflected, for example, in the fact that most of the lawsuits that have been opened in the courts over the last decade are not resolved in a classic adversarial proceeding, and do not end with a reasoned judgment.[87] In addition, judgment under managerial law looks for an agreed solution and the creation of arrangements between the parties, while promoting the values of efficiency and exposure of the truth.[88] In other words, under managerial jurisprudence, the civil proceedings in court may serve the parties engaged in ADR, and thus can become an appropriate response to ADR.

When concentrating on arbitration, it is simple. The parties design the outlines of the arbitration rules which bind the arbitrator. However, these rules are not necessarily committed to values of efficiency or exposing the truth, but to the narrow interests of the parties, including the defendant's interest to earn more time to assess the claim.[89] In this case, managerial jurisprudence in civil procedure has significant advantages due to the commitment to party autonomy and efficient dispute resolution.

However, the battle between managerial jurisprudence and mediation is much more difficult. It is difficult to present a single broad and comprehensive definition of the mediation process because of the extensive variety of situations and methods in which the mediation process can take place.[90]

---

86. *See* Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1446, 1497 (1992).

87. *See generally How Courts Work*, *supra* note 43.

88. Elliott, *supra* note 50, at 326; Resnik, *Managerial Judges*, *supra* note 6, at 376–80.

89. *See* Thomas J. Stipanowich, *Arbitration: The "New Litigation"*, 2010 U. ILL. L. REV. 1, 9–20, 35–49 (2010); James Douglas, *What Is Arbitration?*, LEGALVISION (Sept. 10, 2015), https://legalvision.com.au/what-is-arbitration/.

90. LAURENCE BOULLE & MIRYANA NESIC, MEDIATION: PRINCIPLES PROCESS PRACTICE 14–21 (2001); KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 16–17 (1994) [hereinafter KOVACH, MEDIATION: PRINCIPLES AND PRACTICE]; *see also* Kenneth J. Rigby, *Alternate Dispute Resolution*, 44 LA. L. REV. 1725, 1725–42 (1984); Leonard L. Riskin, *Under-*

Nevertheless, it is possible to point to four main characteristics of the mediation process, which constitute broad common denominators regarding all types of mediation. These characteristics are (1) the autonomy of the parties and their rights to self-determination, (2) an impartial third party – the mediator, (3) willingness and informed consent of the parties, and (4) fairness and impartiality.[91]

These characteristics derive from general perceptions of the nature of mediation. According to these principles, the object of mediation is to resolve disputes by facilitating the parties themselves reaching an agreement with the assistance of a third party who lacks any legitimate authority to determine the outcome of the dispute or to impose an agreement.[92] The agreements are then reached as the product of a joint commitment, with an attempt to develop consensus rather than dwelling on conflicting rights and interests.[93] These characteristics may partly overlap and complement one another in achieving the overall goal of mediation. Now, each of these criteria will be examined in relation to their application in administrative law theory.

The autonomy and the right to self-determination of the parties has been recognized as the main characteristic of the mediation process in its many varied forms because the parties are not obliged to refer their dispute to mediation – instead, they choose to do so.[94] The role of the mediator in this connection is to preserve the parties' autonomy and their right to self-determination, and to do so in such a way that limits the damage to their aspirations. Mediation efforts that preserve the parties' autonomy and their right to self-determination are by their nature supportive rather than coercive.[95]

Civil proceedings under managerial jurisprudence are committed to social efficiency and not necessarily to the autonomy of the parties. When examined in the wide social view, the autonomy of the parties is, in fact, considered as a disadvantage, since the parties may maintain their autonomy, but the society might be paying the social price for that. Managerial juris-

---

standing Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed, 1 HARV. NEGOT. L. REV. 7, 7–26 (1996).

91. *See* Jacqueline Nolan-Haley, *Mediation: The New Arbitration*, 17 HARV. NEGOT. L. REV. 61, 68–70 (2012).

92. Rabinovich-Einy & Katsh, *supra* note 6, at 191.

93. Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 L. & POL'Y 7, 8 (1986).

94. *See* Am. Arbitration Ass'n et al., *Model Standards of Conduct for Mediators*, 17 J. NAT'L ASS'N ADMIN. L. JUDGES 323, 324 (1997) ("Self-determination is the fundamental principle of mediation.").

95. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE, *supra* note 90, at 16–20.

prudence may take the autonomy of the parties into consideration but does so by channeling that autonomy for the benefit of the society as a whole, i.e. efficiency. Therefore, while the influence of mediation is usually limited to the parties within the process, managerial jurisprudence includes the autonomy of the parties in the broad prism of social benefit. Thus, one of the basic principles of ADR is applied to managerial jurisprudence, giving it an advantage over mediation.

Informed consent is regarded as a fundamental characteristic of the mediation process.[96] The characteristic of informed consent in the context of mediation complements the parties' autonomy and right to self-determination.[97] Informed consent emphasizes two important facts. First, the parties have agreed to refer their dispute to an alternative process and to the manner in which the dispute is to be resolved (in contrast to a solution forced upon them in a traditional court judgment).[98] Second, this agreement amounts to informed consent. Informed consent indicates that the parties have all the relevant information required in order to reach a decision on an agreed solution within the framework of mediation. Thus, the parties are more likely to be committed to the agreement that results from the relationship of trust between the mediator and the parties.[99] Yet, informed consent is a sweeping form of agreement in terms of the implications which stem from the solution agreed upon by the parties, which may detrimentally affect one or both of them. Meticulousness in providing the parties with access to information is intended to prevent exposure to manipulation and trickery.[100]

In any event, the nature of the evidence in the case and its legal interpretation are the main factors to which the parties must be exposed prior to

---

96. *See, e.g.*, SOC'Y OF PROF'LS IN DISPUTE RESOLUTION, ETHICAL STANDARDS OF PROFESSIONAL RESPONSIBILITY 2 (1986) ("The neutral has an obligation to assure that all parties understand the nature of the process, the procedures, the particular role of the neutral, and the parties' relationships to the neutral.").

97. Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 840 (1999).

98. *See* JAY FOLBERG & ALISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 10 (1984); James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47, 74 (1991); *Qualities of Mediation*, MEDIATE.COM, https://www mediate.com/divorce/pg35.cfm (last visited Dec. 21, 2018).

99. *See* Donald T. Weckstein, *In Praise of Party Empowerment – And of Mediator Activism*, 33 WILLAMETTE L. REV. 501, 503 (1997) ("The key to self-determination is informed consent. A disputant who is unaware of relevant facts or law that, if known, would influence that party's decision cannot engage in meaningful self-determination.").

100. *See* Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 422, 443 (1997) [hereinafter Menkel-Meadow, *Ethics in Alternative Dispute Resolution*].

entering into the process of dispute resolution. Clearly, awareness of this information should be mutual, since any inequality in this regard would give an unfair advantage to one party at the expense of the other. Therefore, it is apparent that the characteristic of informed consent is a dominant factor in the mediation process.[101] The role of the mediator in this context is to enable free access to relevant information. This is particularly true of information which the mediator has and which touches upon his role during the mediation proceedings, and this may even require the mediator to voluntarily bring such information to the parties' attention if they were unaware of it. This behavior allows making decisions based on maximum certainty and balances any information asymmetry between the parties.[102]

Managerial jurisprudence supports the imposition of wide duties of exposing evidentiary material on both parties. Attaching the evidentiary material to the claim documents and the lawsuit in the very submission to the court, and attaching it to subsequent defense documents, would enable the parties and the court to draw out the exact controversies within the pretrial proceedings.[103] This duty could even be accompanied with a sanction that no other evidentiary material could be submitted to the court if the party failed to disclose relevant evidentiary material.[104] Broad access to evidentiary material at an earlier stage of the litigation enables the court to manage the case much more efficiently. Thus, managerial jurisprudence satisfies the characteristic of informed consent.

The characteristic of fairness in mediation is perceived differently from the fairness to be expected during a trial because of the contrasting nature of mediation vis-à-vis the judicial process. While the fairness to be expected in court proceedings relates to guaranteeing conditions of objectivity and impartiality, fairness in mediation is customarily identified with the parties' ability to realize their freedom of choice within the framework of their autonomy and right to self-determination.[105] Fairness in the context of mediation is not limited to the parties themselves, but should also be shown towards third parties. For example, when relating to the welfare of children whose parents are participating in mediation efforts during divorce proceed-

---

101. *See* Robert A. Baruch Bush & Joseph P. Folger, *Mediation and Social Justice: Risks and Opportunities*, 27 OHIO ST. J. ON DISP. RESOL. 1, 13, 16, 26 (2012).

102. *See* Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 268 (1989).

103. *See* Cooter & Rubinfeld, *supra* note 70, at 435.

104. *See supra* Part IV.B.4.

105. SARAH R. COLE ET AL., MEDIATION: LAW, POLICY & PRACTICE 3–13 (2d ed. 2001); Joseph B. Stulberg, *Fairness and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 909, 910–14 (1998).

ings,[106] the mediation process necessarily references the effects of the mediation process on the best interests of the couple's children and therefore must provide broad information to assist the parents in reaching their decisions with that perspective in mind.

The main difficulty in ensuring procedural fairness in the mediation process has its roots in the fact that the process is not based on strict, formal proceedings, a feature which distinguishes it from the judicial process.[107] Mediation does not guarantee that absolute balance will be achieved between the disproportionate strengths of the parties, although it is developing in this direction.[108]

Managerial jurisprudence is a dominant player in that fairness. A manager can easily lose the ability to lead or manage an organization if that person fails to treat others fairly. In other words, a manager who does not act fairly may lose his or her legitimacy to continue leading the organization in the future.[109] Similarly, the judge has an advantage in maintaining procedural fairness in judicial mediation for a number of reasons, but perhaps most importantly because of his or her ability to ascertain that there has been informed consent to a solution that does not contradict the binding legal rules.[110] Fairness does not contradict efficiency, but rather increases it in social terms for potential parties. As postulated by John Rawls, parties presumed to be under the veil of ignorance would prefer a fair play.[111] Therefore, managerial jurisprudence can promote the criterion of fairness.

The characteristic of impartiality relates directly to the relationship between the mediator and the parties to mediation as an integral part of the mediation process. In accordance with this characteristic, the mediator must be impartial in his relations with the parties within the framework of the

---

106. *See, e.g.*, CAL. FAM. CODE §§ 3161–3162, 3180, 3184 (West 2018); KAN. STAT. ANN. § 23-3504 (2018).

107. BOULLE & NESIC, *supra* note 90, at 69–70; Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 755–90 (1984).

108. For a detailed discussion of the way in which different models of mediation deal with the gaps in power between the parties, see ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT 40, 45–53, 65–66, 78–83 (2005); Riskin, *supra* note 90, at 13–14, 24–35. *See also* JOHN WINSLADE & GERALD MONK, PRACTICING NARRATIVE MEDIATION: LOOSENING THE GRIP OF CONFLICT 3–39 (2008).

109. *See generally* Joel Brockner, *Why It's So Hard to Be Fair*, HARV. BUS. REV., Mar. 2006, https://hbr.org/2006/03/why-its-so-hard-to-be-fair.

110. Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 355–56, 363 (1986); Nancy A. Welsh, *The Current Transitional State of Court-Connected ADR*, 95 MARQ. L. REV. 873, 874–77, 880–81, 883–86 (2012).

111. *See* JOHN RAWLS, A THEORY OF JUSTICE 136 (1971).

mediation process.[112] Impartiality means the absence of bias, an evenhanded approach by the mediator in addressing the parties, the absence of conflicts of interest with the parties, and equidistance, that is, maintaining an equal separation from both parties in conducting the mediation process.[113]

The need for impartiality in mediation often prevents the process from beginning. Accordingly, it has been suggested that a distinction be drawn between neutrality and impartiality.[114] Neutrality relates to the absence of conflicts of interest between the mediator and the parties, whereas impartiality relates to fairness, that is, the manner in which the mediator should conduct the proceedings before him and in which he relates to the parties. In other words, neutrality touches upon the mediator's background and his relationship with the parties, including any prior association with either of them, as well as the existence of any personal interest the mediator may have in the outcome of the mediation. Impartiality implies merely evenhandedness, objectivity, and fairness towards the parties to the mediation, including the time apportioned between them, together with the absence of any external impression of bias shown towards one of the parties.[115]

In light of this dichotomy between neutrality and impartiality, some have suggested that impartiality be treated as an essential and indispensable component of mediation proceedings, whereas neutrality may be regarded as a less than absolute concept and may be realized or diminished without this detrimentally affecting the essential character of the proceedings as a mediation process.[116] Managerial jurisprudence cannot afford partiality of the judge. The efficient solution and the efficient procedure are chosen, regardless of the identity of the specific parties. This is extremely important when managerial jurisprudence pays attention to the society-wide aspects of civil proceedings and to the potential parties. Any case is considered as a test case for the broader social implications of each decision under managerial jurisprudence. Impartiality and neutrality are therefore crucial for man-

---

112. *See* JONATHAN G. SHAILOR, EMPOWERMENT IN DISPUTE MEDIATION: A CRITICAL ANALYSIS OF COMMUNICATION 8 (1994); Orna Cohen, Naomi Dattner & Ahron Luxenburg, *The Limits of the Mediator's Neutrality*, MEDIATION Q., Summer 1999, at 321.

113. CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 52 (2d ed. 1996); REBECCA JANE WEINSTEIN, MEDIATION IN THE WORKPLACE: A GUIDE FOR TRAINING, PRACTICE, AND ADMINISTRATION 68 (2001); Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, *supra* note 100, at 443; Janet Rifkin, Jonathan Millen & Sara Cobb, *Toward a New Discourse for Mediation: A Critique of Neutrality*, MEDIATION Q., Winter 1991, at 152–53.

114. D. Donald, *Neutrality, Impartiality, and UN Peacekeeping at the Beginning of the 21st Century*, 9 INT'L PEACEKEEPING 21, 22–23 (2002).

115. *Id.*

116. Wallace, *supra* note 57, at 39–41.

agerial jurisprudence, no matter the type of dispute resolution system utilized.[117]

In addition, the judge is considered more distant from the conflict than the mediator, and therefore enjoys a more objective image.[118] Also, the judge's ability to enforce the agreement which was achieved as part of a judicial conciliation proceeding increases public confidence in the judge's effectiveness in resolving the conflict.[119] Moreover, lawyers report that as the judge empathically refers to the parties, thereby allowing them to express themselves, and does not adopt an approach that forces an arrangement, a sense of neutrality and a lack of judicial bias are created.[120] This approach not only legitimizes judicial compromise, but also increases public confidence in the judgment.[121]

This Part presents advantages of managerial jurisprudence that use a conciliatory approach in judicial proceedings. This approach expresses a shift from an adversarial traditional judicial process to a more conciliatory one. Against this approach, there is much criticism, the full discussion of which is outside the scope of this Article. In short, I would like to point out that most of the criticism relates to the fact that the conduct of mediation proceedings between the parties conducted in a judicial framework is accompanied by formal and authoritative indicators.[122] These characteristics may harm the flexibility and creativity of the settlement process and there is a concern that the judge will exercise judicial power. This power is likely to be expressed in the exertion of improper pressure on the parties to compromise.[123] In addition, there is a concern that the ability to obtain consent that is a result of the parties' free will may be impaired. This concern is increasing in legal systems under the weight of high volumes of pending cases. Such systems may put pressure on the judges to finish processing cases quickly.[124]

---

117. *Id.*

118. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076–85 (1984).

119. Thomas D. Lambros, *The Judge's Role in Fostering Voluntary Settlements*, 29 VILL. L. REV. 1363, 1364–66 (1983); Schuck, *supra* note 110, at 910–15.

120. Evan M. Rock, *Mindfulness Mediation, the Cultivation of Awareness, Mediator Neutrality, and the Possibility of Justice*, 6 CARDOZO J. CONFLICT RESOL. 347, 348–50 (2005).

121. Roselle L. Wissler, *Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences*, 26 OHIO ST. J. ON DISP. RESOL. 271, 283–300 (2011).

122. Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 LAW & SOC. INQUIRY 35, 35–38, 46–51 (1991).

123. Hensler, *supra* note 10, at 173; Schuck, *supra* note 110, at 346–47; *see also* Wayne D. Brazil, *Hosting Settlement Conferences: Effectiveness in the Judicial Role*, 3 OHIO ST. J. ON DISP. RESOL. 1, 3 (1987).

124. John E. Coons, *Approaches to the Court Imposed Compromise – The Uses of Doubt and Reason*, 58 NW. U. L. REV. 750, 750–52 (1963).

In order to neutralize the concerns described above, it is appropriate to set detailed and appropriate guidelines for judges engaged in judicial conciliation in accordance with managerial jurisprudence. These guidelines may be based, *inter alia*, on the criteria proposed in this Article for managing a legal proceeding.[125] Uniform guidelines will give judges the tools to improve their performance as mediators. Another advantage is assistance in maintaining the appearance of justice as well as judicial certainty for judges, lawyers, and the public as a whole.[126] The administration of justice through a conciliatory approach is in the process of consolidation and development, which in the future may lead to an improvement in the management of judicial proceedings in the world's courts.

VI. CONCLUSION

This Article asserts that a judge is a manager, judicial skills are managerial skills, and judging a case is, in fact, managing a case. In all legal systems around the world, civil cases are brought before the court in order to be managed by the court. Very often both parties of the civil case prefer a satisfactory solution, and not necessarily exposing the truth or bringing about deontological justice. If so, why should civil procedure rules be assessed through standards which are aimed for exposing the truth and not through standards of management and efficient dispute resolution?[127]

Changing the targets of civil procedure from exposing the truth to managing the case would enable efficiency to enter the discourse on the evaluation of civil proceedings. Moreover, the civil procedure sphere should not stand isolated from other spheres of law, in which efficiency is already a dominant perspective for evaluation. Managerial jurisprudence has the ability to advance both efficiency and justice in a fair way, since justice has to be managed as well.[128]

---

125. *See supra* Part IV.

126. Arthur L. Stinchcombe, *Certainty of the Law: Reasons, Situation-Types, Analogy, and Equilibrium*, 7 J. POL. PHIL. 209, 218–20 (1999).

127. Lord Justice Leggatt, *The Future of Oral Tradition in the Court of Appeal*, 14 CIV. JUST. Q. 11, 11–13 (1995).

128. *See* Hugh Gravelle, *Regulating the Market for Civil Justice*, *in* REFORM OF CIVIL PROCEDURE: ESSAYS ON 'ACCESS TO JUSTICE' 279, 279–284 (A. A. S. Zuckerman & Ross Cranston eds., 1995).