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## Israeli Perspectives on Alternative Dispute Resolution and Justice

Omer Shapira

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# Israeli Perspectives on Alternative Dispute Resolution and Justice

Omer Shapira\*

Israel is a highly litigious country with an overburdened legal system infected with delays. In addition, Israeli society is highly diversified and saturated with social disagreements and rifts between groups. This article identifies two concepts of justice in ADR discourse in Israel—Justice as Efficiency and Justice Beyond Efficiency—and illustrates their application in the context of several ADR developments in the court system, community mediation, the education system, environmental conflicts, and complaints against public bodies. Using these visions of justice, the article explores the justice goals of ADR in Israel, assesses whether they have been achieved, and considers the future of ADR and Justice in Israel. As the phenomena of overburdened legal systems and social disagreements are not restricted to Israel, the analysis of ADR and Justice offered in this article may be of relevance to other countries facing similar problems, including the United States and Europe.

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## I. INTRODUCTION

Israel is a highly-litigious country and a world leader in the number of cases filed per capita.<sup>1</sup> The combination of a high volume of cases and a relatively small judiciary has contributed to an overburdened legal system infected with delays in the delivery of judgments. In addition, Israeli society is highly diversified. Recently, the Israel State Comptroller observed in a special report that:

The dissimilarities among sections of society lead to social disagreements and rifts between groups such as Arabs and Jews . . . observant and non-observant Jews; [and] left-wingers and right-wingers . . . These divisions have changed the face of Israeli society . . . Expressions of

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<sup>1</sup> *Risk Management: The Most Litigious Countries in the World*, CLEMENTS WORLDWIDE (last visited Nov. 3, 2018), <https://www.clements.com/resources/articles/The-Most-Litigious-Countries-in-the-World>.

racism and violence, bigotry, persecution and even crimes of hatred have become not-quite-so rare occurrences.<sup>2</sup>

This article begins by identifying two visions of justice in ADR discourse in Israel: a narrow sense of justice as efficiency, which aims for quick, cheap resolution of legal disputes; and a richer concept of justice beyond efficiency, which seeks to offer a more comprehensive and complex response to conflicts—legal and others, between individuals and groups—and to promote a better society based on values of tolerance, dialogue, and consent.

After a brief overview of the development of ADR in Israel, this article illustrates the different visions of justice in the context of several particular areas in which ADR developed in Israel: the court system, with its focus on court-connected mediation programs; community mediation; the education system; environmental conflicts; and complaints against public bodies. In addition, this article discusses some of the key concerns about justice and ADR, which have had an impact on the development of ADR in Israel.

The next section evaluates whether the Israeli ADR initiatives have achieved their goals. It reviews information from a large variety of sources, including scholarly articles, Governmental Ministries' annual reports, State Comptroller and Ombudsman reports, Knesset (Parliament) protocols, Courts Administration statistics, policy papers, and media articles. Though the evidence points to a very modest impact on the Israeli justice system and social climate, the last section, concentrating on the future of ADR and justice in Israel, identifies exciting and positive developments growing out of both state (legislative and other) actions and private initiatives that could make a greater impact on the Israeli justice system and society in the future.

## II. THE JUSTICE DISCOURSE IN THE DEVELOPMENT AND GROWTH OF ADR IN ISRAEL

### A. *Defining Justice and ADR for the Purpose of the Article*

Justice is an elusive term that has multiple meanings and is used in a wide range of contexts.<sup>3</sup> This article focuses on the justice goals of ADR in Israel. Alternative Dispute Resolution (“ADR”) is a term used to describe a collection of dispute resolution methods and processes that offer alternatives to traditional adjudication in the courts, including, *inter alia*, negotiation, mediation, early neutral evaluation, mini-trial, med-arb, and arbitration.<sup>4</sup> In Israel, the introduction of arbitration into the legal

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<sup>2</sup> See Special Report on Education for a Shared Society and Prevention of Racism (2016), STATE COMPTROLLER AND OMBUDSMAN OF THE STATE OF ISRAEL, <http://www.mevaker.gov.il/he/Reports/Pages/545.aspx>. English abstract available at [http://www.mevaker.gov.il/he/Reports/Report\\_546/53a7c1d8-b0ce-4eb5-a228-66a1ea62635f/102-life-together-eng-abstract.pdf](http://www.mevaker.gov.il/he/Reports/Report_546/53a7c1d8-b0ce-4eb5-a228-66a1ea62635f/102-life-together-eng-abstract.pdf) [hereinafter “Comptroller Special Report on Education”].

<sup>3</sup> See, e.g., M.D.A FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE, Ch.7 (8th ed., 2008).

<sup>4</sup> See, e.g., KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES & PRACTICE, 6–18 (3d ed., 2004); JAY FOLBERG & ALISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION, 26–33 (Jossey-Bass ed., 1984); STEPHEN B. GOLDBERG, FRANK E.A. SANDER, NANCY H. ROGERS & SARAH RUDOLPH COLE, DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES, 3–6 (5th ed., 2007).

system in 1968 preceded the ADR movement, but the use of arbitration has been and still remains small. The most discussed and used ADR process in Israel since the late 1990s is by far mediation, thus this article will focus mostly on the justice discourse in Israel with respect to mediation.

Justice in the context of ADR can relate to the goals of ADR, the conduct of ADR (i.e., the ways in which ADR methods are employed), and the effects or outcomes of ADR. Although ADR discourse in Israel tends to refrain from using the term "justice," it touches in effect on all these aspects of justice.

### 1. *Justice and the Goals of ADR*

Menkel-Meadow refers to three main goals of ADR: first, a "quantity" goal, promoted by the judiciary for "cheaper, faster and more efficient docket clearing from long queues in court"; second, a "quality" goal which seeks "more tailored and party fashioned solutions to legal problems, including a focus on future relations, not just the past"; and third, a "political" goal, that is "greater party participation and de-professionalization ('let's not have lawyers if we don't need to') and democratization of dispute resolution."<sup>5</sup> Other goals of ADR include personal growth and transformation, and societal improvement.<sup>6</sup>

I will refer to the first goal of ADR—providing cheaper, faster, and docket clearing processes—as "Justice as Efficiency." This has been and still is the dominant feature of ADR discourse in Israeli literature. The other goals of ADR—providing better solutions to legal problems, greater party satisfaction, maintaining and improving relationships, enhancing party participation and bringing about personal and social changes—will be referred to together as "Justice beyond Efficiency."

"Access to Justice" is another term that is often mentioned in the context of ADR. It should be noted, however, that the Access to Justice and the ADR movements are not the same though they share some common objectives. A thin version of Access to Justice is aimed at disempowered persons who, due to socio-economic reasons, have difficulties realizing their legal rights and gaining access to legal services. A thicker version treats justice as more than access to the legal system and legal rights, and includes attempts to strengthen communities and community values outside the legal system.<sup>7</sup> Access to justice as a goal, therefore, can be promoted by both Justice as Efficiency—an accessible, cheaper, less congested court system which offers inexpensive, informal methods of conflict resolution besides traditional litigation—and Justice beyond Efficiency, that is a wider range of quality solutions to problems, a greater role for participants, and a place for community action and values.

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<sup>5</sup> Carrie Menkel-Meadow, *Is ODR ADR? Reflections of an ADR Founder from 15th ODR Conference, the Hague, the Netherlands*, 3 INT'L J. OF ONLINE DISP. RESOL., 4–7 (2016), <https://ssrn.com/abstract=2893919> (noting that the modern ADR movement was founded in the United States in the 1970s and since then travelled globally).

<sup>6</sup> See OMER SHAPIRA, A THEORY OF MEDIATORS' ETHICS: FOUNDATIONS, RATIONALE, AND APPLICATION 96 (2016) [hereinafter SHAPIRA, MEDIATORS' ETHICS].

<sup>7</sup> See MICHAL ALBERSTEIN, JURISPRUDENCE OF MEDIATION 29-31 (2007).

## 2. *Justice and the Conduct of ADR*

Justice can refer to the ways in which ADR processes are conducted. Just ADR processes must adhere to certain standards of conduct (e.g., treat parties with dignity) and must be conducted by competent neutrals.<sup>8</sup> An ADR process led by an incompetent neutral or a process that coerces parties to make decisions that they have the right to make will not be considered just. This aspect of ADR and Justice, which focuses on the quality of ADR, has significant presence in Israeli scholarship.<sup>9</sup>

## 3. *Justice and the Outcomes of ADR*

The outcomes of ADR processes may also be viewed as just or unjust. A specific outcome may be subjectively perceived as unjust by the parties or the public, and may be considered normatively unjust if it is inconsistent with the rules of law or the rules of morality, or if it is unconscionable.<sup>10</sup> On an aggregate, ADR processes may be viewed as contributing to a more just society in terms of empowerment of individuals, promotion of non-violent communication and harmonious resolution of differences, and tolerance for different worldviews and perspectives. These justice issues often surface in Israeli literature because of the deep rifts and fundamental disagreements within Israeli society.<sup>11</sup>

### B. *A Brief Overview of the Development of ADR in Israel*

Israel is a highly litigious country. According to research, Israel is a world leader in the number of cases filed per capita.<sup>12</sup> In 2004, Israel was ranked third in judicial burden among seventeen developed countries.<sup>13</sup> The combination of a high number of filed cases and a relatively small number of judges contributed to an overburdened legal system infected with delays in the delivery of judgments. In 1980, a Committee on the Structure and Jurisdiction of the Courts (hereinafter the “Landau Committee”) observed that the case overload in the courts is so high that there is a concern that, without a quick solution, the justice system would not be able to carry out its tasks and serve the public.<sup>14</sup> Similar concerns

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<sup>8</sup> See Omer Shapira, *Conceptions and Perceptions of Fairness in Mediation*, 54 S. TEX. L. REV. 281 (2012) (discussing the meaning of fairness).

<sup>9</sup> See *infra* notes. 124-37.

<sup>10</sup> SHAPIRA, MEDIATORS' ETHICS, *supra* note 6, at 304-06 (discussing the possible meanings of outcome fairness).

<sup>11</sup> See *infra* Section II(D).

<sup>12</sup> See Mordehai Mironi, *Mediation v. Case Settlement: The Unsettling Relations between Courts and Mediation - A Case Study* 19 HARV. NEGOT. L. REV. 173, 175 (2014); see also Yaacov Neeman, Israel Bar Association Conference, (Nov. 9, 2014), [http://www.israelbar.org.il/article\\_inner.asp?pgId=200083&catId=6](http://www.israelbar.org.il/article_inner.asp?pgId=200083&catId=6) (“The main problem of the legal system in Israel is delay of justice. No country in the world has so many lawsuits per capita. We have a world record, and we should feel ashamed.”).

<sup>13</sup> Raanan Sulitzeanu-Kenan, Amnon Reichman & Eran Vigoda-Gadot, *Judicial Workload: A Comparative Study of 17 Countries*, CTR. FOR PUB. MGMT. & POL'Y (2007), [http://elyon1.court.gov.il/heb/haba/Courts\\_burden\\_Final\\_report\\_5.07.pdf](http://elyon1.court.gov.il/heb/haba/Courts_burden_Final_report_5.07.pdf).

<sup>14</sup> *Committee on the Structure and Jurisdiction of the Courts*, in LANDAU BOOK VOL. A 205 (Aharon Barak & Elinor Mazuz eds., 1995).

were voiced by academic researchers<sup>15</sup> and judges,<sup>16</sup> and continue to date. ADR is but one attempt to meet this challenge along with other methods, such as increasing the number of judges, simplifying civil procedures, and introducing new fast-track procedures for some types of cases.

ADR was formally introduced into the legal system in 1992 in an Amendment to the Courts Law enabling judges to utilize three ADR methods: adjudicate a case with the parties' consent by way of compromise, that is, issue a summary judgment without conducting a full trial and explaining the reasons for the decision; refer a case to mediation (at that time using the term "conciliation" or "pishur" in Hebrew); and refer a case to arbitration.<sup>17</sup> In fact, at that point of time, arbitration was already a legally-recognized means of resolving disputes under the Arbitration Act 1968, leading one expert on arbitration to doubt the need for that amendment as far as arbitration was concerned.<sup>18</sup>

The judicial compromise procedure is popular among judges, but disputants and lawyers regard it with caution because of the difficulty in predicting how the judge will decide the case, the absence of reasons for the decision, and the impossibility in practice to appeal that decision.<sup>19</sup> Arbitration has not succeeded in attracting many users because of the great difficulty to judicially review arbitrators' decisions under Israeli arbitration law.<sup>20</sup> The limited reviewability of arbitration awards led the state to refrain from using arbitration in disputes to which it was a party, and a 2003 Attorney-General Directive provided that "as a rule the state does not resolve its disputes in arbitration but through the courts."<sup>21</sup> In 2008, the law was amended to authorize parties to agree on an appeal procedure for arbitrators' decisions,<sup>22</sup> and in 2009, the Attorney-General revised its previous position on arbitration and issued a new directive stating that "the state sees in arbitration, alongside other dispute resolution processes, a legitimate and worthy tool, in appropriate cases, to the resolution of state disputes."<sup>23</sup> New private Arbitration Institutions have been formed,<sup>24</sup> offering arbitration services by retired judges and

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<sup>15</sup> See e.g., Moshe Barniv & Ran Lachman, *The Reform of the Israeli Court System: The Viewpoints of Lawyers and Judges*, 8 BAR-ILAN L. STUD. 139 (1990) (Hebrew).

<sup>16</sup> See e.g., LCivApp SC 117/81 Ruth Walter v. Dick & Co Inc PD 35(3) 305, 307 (Mar. 21, 1981) (referring in Justice Cohen's judgment to the burden on the courts and its adverse effect on the public); see also CrimApp SC 2103/07 Avihu Horowitz v. State of Israel (Nevo, Dec. 31, 2008) (shortening the sentence of the appellants, noting the delay in the delivery of judgment by the District Court, which resulted from the high burden on the District Court, and referring to the chronic problem of heavy workload on the courts); Yoram Alroi, *Conflict Resolution – Another Possibility* 1 HAMISHPAT 311 n.1 (1993) (quoting Justice Zvi Berenson Former Vice-President of the Israeli Supreme Court on the delay of justice); Justice Eliyahu Matza, *Court Workload Harms the Public*, ISR. DEMOCRACY INST. (Feb. 22, 2011), <https://www.idi.org.il/articles/9380>.

<sup>17</sup> See Courts Law (Consolidated Version) § 79A (1984) (Hebrew).

<sup>18</sup> Smadar Ottolenghi, *Thoughts on Mediation Legislation*, 3 SHAAREY MISHPAT 25, 29 (2002) (Hebrew).

<sup>19</sup> See, e.g., Chemi Ben Noon & Amnon Gavrieli, *Critique of Section 79A of the Courts Law* (1984), 46 HAPRAKLIT 247, 259 (2002) (Hebrew).

<sup>20</sup> See *infra* notes 25, 151-53.

<sup>21</sup> Att'y-Gen. Directive 6.1204 (Sept. 14, 2003).

<sup>22</sup> Arbitration Law (Am. No.2) (2008).

<sup>23</sup> Att'y-Gen. Directive 6.1205 (Resolution of Disputes to which the State is a Party by Way of Arbitration) (Oct. 12, 2009).

<sup>24</sup> See e.g., The Center for Arbitration and Dispute Resolution, founded in 2008 <http://www.eng.israelcourts.co.il/>; the Israel Bar Association Institute of Arbitration, founded in 2009; The Intro Institute for Arbitration and Dispute Resolution, founded in 2009, <http://www.itrold.com/>; The Arbitration Federation, founded in 2016 <http://www.borer.org.il/>; and the Israeli Institute of Commercial Arbitration, founded in 1991 <http://eng.borerut.com/>.

experienced lawyers, but the number of cases that went to arbitration has not increased significantly.<sup>25</sup> A 2011 proposed parliamentary bill seeking to introduce mandatory arbitration into the legal system failed to become law.<sup>26</sup>

In comparison to compromise and arbitration, mediation has received more support from the government and the judiciary. Already in the late 1950s, “the Settlement of Labor Disputes Law of 1957 provided for a type of mandatory mediation by special labor relations officers at the Ministry of Labor in all labor disputes.”<sup>27</sup> This procedure, however, did not play a significant role in resolving labor disputes.<sup>28</sup>

Mediation in civil disputes was introduced in 1992 through an amendment to the Courts Law that authorized judges to refer disputants to mediation (using the term “conciliation” or “pishur” in Hebrew).<sup>29</sup> The Amendment was followed in 1993 by the Courts Mediation Regulations, issued by the Minister of Justice, specifying the procedure to be followed by the court in staying pending cases referred to mediation, laying down the duties of mediators in the conduct of mediation in civil and labor courts, and suggesting a standard mediation agreement.<sup>30</sup> Up to now, Israel has not adopted a general law of mediation, and therefore, mediation that is not court-referred is left largely unregulated.<sup>31</sup>

In Israel, mediators are not required to obtain a license to practice mediation. However, in 1998 the Minister of Justice appointed a Consulting Committee on Mediation in the Courts with the task of making recommendations on the qualifications and expertise necessary for court-connected mediators (hereinafter the “Gadot Committee”).<sup>32</sup> The Gadot Committee published guidelines on the minimum qualifications of court-connected mediators that became the acceptable standard for mediator training in Israel.<sup>33</sup> The Gadot Committee observed that the use of mediation in Israel was rare and that the process was mostly unknown to the public and the legal profession.<sup>34</sup> In that year, the Ministry of Justice set up a National Center for Mediation and Dispute Resolution in order to concentrate efforts to spread mediation.<sup>35</sup> A year later, the Attorney

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<sup>25</sup> See e.g., Michael Ben-Yair, *The State of the Litigators*, 12 *THE LAWYER* 34, 35–36 (2011); see also Anne Suci, *Unlimited Privatization: The Case of the Compulsory Arbitration Bill*, *CTR. FOR SOC. JUST. DEMOCRACY, THE VAN LEER JERUSALEM INSTITUTE* 4 (2012), <http://www.vanleer.org.il/en/publication/unlimited-privatization-case-compulsory-arbitration-bill>; Dafna Lavi, *Don't be Fooled by the Trappings: Towards a New Paradigm for Understanding Early Neutral Evaluation (ENE) and its Adoption by the Israeli Legal System*, 19 *L. & BUS.* 416, 431 (2015).

<sup>26</sup> The Bill Proposal (Hebrew) is available at [http://www.knesset.gov.il/committees/heb/material/data/H08-08-2012\\_13-15-08\\_606.pdf](http://www.knesset.gov.il/committees/heb/material/data/H08-08-2012_13-15-08_606.pdf).

<sup>27</sup> Mironi, *Mediation*, *supra* note 12, at 191

<sup>28</sup> *Id.*

<sup>29</sup> Courts Law (Consolidated Version) § 79A (1984). In 2001, the term conciliation (“Pishur” in Hebrew) had been officially replaced by the legislature with the term mediation (“Gishur” in Hebrew).

<sup>30</sup> Courts Regulations (Mediation) 1993.

<sup>31</sup> Some degree of regulation is available through general laws that apply to everyone (e.g., a duty to negotiate contracts in good faith) and through judicial rulings that apply requirements of confidentiality and privilege to out-of-court mediations.

<sup>32</sup> The Consulting Committee on Mediation in the Courts, *Report on the Qualifications and Expertise Necessary to be Included in the Mediators List* (1998) [hereinafter *the Gadot Report*].

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 4.

<sup>35</sup> The center was closed in 2009. Dana-Weiler-Polak, *Mediators Slam Plan to Close National Center for Conflict Resolution*, *HAARETZ* (June 3, 2009, 1:57 AM),



General issued a directive encouraging the mediation of disputes involving the government.<sup>36</sup>

Since the late 1990s, the courts began referring civil cases to mediation, either to in-court mediators, court personnel employed by the court, or to private-sector mediators who underwent training courses approved by the court system.<sup>37</sup> In addition, criminal cases have been referred to judicial mediation sessions conducted by judges not assigned to hear the case on trial.<sup>38</sup> In 2001, the courts established Case Routing Units that had responsibility for referring cases to mediation, and in 2003, the Director of the Courts Administration published a national program for the operation of the Case Routing Units that served as the major supplier of mediation cases in the country.<sup>39</sup>

In practice, however, the number of disputants who elected to participate in mediation proceedings was small.<sup>40</sup> In 2006, a Commission to Explore the Ways to Increase the Use of Mediation in the Courts (hereinafter the "Rubinstein Committee") recommended the introduction of a soft version of mandatory mediation as a pilot scheme in a number of civil courts.<sup>41</sup> According to the scheme, disputants in civil proceedings were required to attend a free, mandatory pre-mediation session with a mediator in which they received information about mediation and evaluated the suitability of their case for mediation.<sup>42</sup> At the end of this session, the parties could either choose mediation or litigation.<sup>43</sup> The procedure was termed "Information Exchange, Acquaintance and Coordination" or MAHUT (the acronym in Hebrew), and became part of the Civil Procedure Regulations.<sup>44</sup> Since 2016, an extended version of MAHUT has also exposed divorcing parties to consensual alternatives to settle their family disputes through four sessions with a social worker from the Family Court Assistance Units.<sup>45</sup>

Out-of-court ADR initiatives began in the early 2000s.<sup>46</sup> Community mediation programs evolved with the help and guidance of the National Center for Mediation and Dispute Resolution.<sup>47</sup> In 2001, two community mediation centers were active and ten centers were in the process of

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<https://www.haaretz.com/1.5059653>.

<sup>36</sup> Att'y Gen. Directive 6.1203 (Resolution of Disputes to Which the State is a Party by Way of Mediation) (1999).

<sup>37</sup> Itzhak Zamir, *Mediation in Public Affairs*, 7 LAW & GOV'T. 119, 124 (2004).

<sup>38</sup> *Id.* at 131, 137-39.

<sup>39</sup> ALBERSTEIN, *supra* note 7, at 98.

<sup>40</sup> See generally Mironi, *Mediation*, *supra* note 12, at 176 (stating that the mediation movement in Israel also lost support from the Justice Ministry).

<sup>41</sup> Orna Rabinovich-Einy, *Pre-Action Protocols, Mediation and Access to Justice under the Proposed Reform of Israeli Civil Procedure Rules*, 9 MISHPATIM AL ATAR 33, 43 (2005) (Hebrew).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Israel Civil Procedure Regulations, 5744-1984*, WIPO (July 3, 1984), [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=367140](http://www.wipo.int/wipolex/en/text.jsp?file_id=367140). The new Civil Procedure Regulations, which were signed by the Minister of Justice on September 5, 2018, will enter into force within one year.

<sup>45</sup> Meir Linzen, Herzog, Fox & Neeman, *The Recent Amendments and Developments in Israel for Private Clients*, WHO'SWHOLEGAL (Nov. 2016), <http://whoswholegal.com/news/features/article/33491/recent-amendments-developments-israel-private-clients>.

<sup>46</sup> See Mironi, *Mediation*, *supra* note 12, at 196-99 (listing ADR initiatives made by the state and its agencies).

<sup>47</sup> See Mironi, *Mediation*, *supra* note 12, at 196.

establishment.<sup>48</sup> Today, there are more than forty.<sup>49</sup> In addition, Citizens' Advisory Services Units ("Shil" in Hebrew), under the auspices of the Ministry of Social Affairs and Social Services, are now offering, inter alia, mediation services free of charge in dozens of communities across the country.<sup>50</sup>

In the private sector, the new field and emerging profession of ADR has attracted thousands of people.<sup>51</sup> Although arbitration has remained in the shadows, more than one thousand people have undergone basic mediation training in accordance with the Gadot Committee standards for mediator training in 2001.<sup>52</sup>

Furthermore, in 2001, about forty private mediation centers were already offering mediator training courses and mediation services to the public.<sup>53</sup> However, the surge in the number of mediators, more than thirty-thousand today,<sup>54</sup> did not translate itself into a sustainable mediation practice.<sup>55</sup> The majority of the new trainees have not evolved into professional mediators who conduct mediations for a fee or even pro bono, because the number of mediators who actually receive cases from the courts is small, and the general public does not tend to mediate before litigation.<sup>56</sup>

### C. *Justice as Efficiency*

Clearly, the prominent motive for the introduction of ADR into the Israeli legal system was the anxious need to face the challenges of an overburdened court system.<sup>57</sup> The 1992 Proposal to amend the Court's Law stated "[i]t is proposed to provide compromise, mediation<sup>58</sup> and arbitration formal status in law, all to enable the disputants to choose additional ways to settle their dispute and thus accelerate resolution of the dispute and ease the overload of litigation in the courts."<sup>59</sup> Concerning the compromise procedure, "the main advantage of agreement on the end of dispute in this method is efficiency and speed, with judgment being delivered in most cases on the basis of the disputants' claims alone, without bringing additional evidence."<sup>60</sup> The purpose of arbitration,

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<sup>48</sup> *A Map of the State of Mediation in Israel*, 1 BEHASKAMA 24, 26 (2001).

<sup>49</sup> See *Israel National Program for the Promotion of Dialogue and Conflict Resolution in the Community*, GISHURIM PROGRAM, [http://www.gishurim.org/?page\\_id=102](http://www.gishurim.org/?page_id=102) (listing community mediation centers throughout Israel).

<sup>50</sup> Letter to the Editor by David Knafo, Director of the Special Tasks Division, Ministry of Labor and Social Affairs, 2 BEHASKAMA 28 (2002); see also Citizens' Advisory Services Units' areas of activities (including mediation) in <https://molsa.gov.il/Populations/Community/Volunteering/Shil/Pages/Search.aspx>.

<sup>51</sup> See Mironi, *Mediation*, *supra* note 12, at 198.

<sup>52</sup> See *A Map of the State of Mediation in Israel*, *supra* note 48, at 25.

<sup>53</sup> See *id.* at 26.

<sup>54</sup> Mironi, *Mediation*, *supra* note 12, at 193 n.79.

<sup>55</sup> See *id.* at 199-204 (discussing the decline of mediation).

<sup>56</sup> See *id.* at 209.

<sup>57</sup> See e.g., ORNA DEUTSCH, *MEDIATION: THE AWAKENING GIANT* 67 (1998); see also Rabinovich-Einy, *supra* note 41, at 43.

<sup>58</sup> The Law Proposal and the subsequent adopted law used the Hebrew word "pishur" which translates to "conciliation." Since "pishur" sounds similar to compromise ("pshara"), the law was amended in 2001, using the Hebrew word "gishur" which is the equivalent to "mediation."

<sup>59</sup> Courts Law Proposal, Amend. No. 15, (1991).

<sup>60</sup> Jacob Avi Baruch Tirkel, *One to the Law and One to Compromise—On Compromise and On Judgment by Way of Compromise*, 3 SHAAREI MISHPAT 13, 21 (2002) (Hebrew).

wrote the past President of the Israeli Supreme Court, Justice Meir Shamgar, "is to enable disputants to speed up the resolution of disputes, among other things by simplifying procedures, and to ease the burden of litigation in the courts."<sup>61</sup>

With regard to mediation, the legislature has adopted a practical, solution-oriented definition for the process that fits an efficiency vision of justice.<sup>62</sup> In practice however, until the end of the 1990s, the new legislation failed to reach its efficiency goal of bringing a significant change in the use of mediation in the courts.<sup>63</sup> In 1997, the Committee on the Structure of Ordinary Courts in Israel (the Or Committee) stressed again the efficiency rationale of ADR, noting the importance of out-of-court ADR processes, including mediation, to help reduce the courts' case overload and delays.<sup>64</sup>

State initiatives designed to encourage the use of ADR consistently referred to the efficiency feature of mediation; for example, the 1999 Attorney-General's Directive on the Resolution of Disputes to which the State is a Party by Way of Mediation (hereinafter the "Attorney-General's Directive on Mediation") noted that mediation is usually cheaper and more efficient than litigation in court.<sup>65</sup> In addition, the 2001 national program for the Case Routing Units in the court system noted that the program's purpose was to offer "swift, efficient and effective justice to the citizen, by improving the service to those who come to court" and "quickly end dealing with filed cases."<sup>66</sup> Moreover, the Rubinstein Committee that recommended the introduction of the mandatory pre-mediation session (MAHUT) in civil procedures has also noted the efficiency and cost-savings of more frequently resorting to mediation both for the court system and disputants.<sup>67</sup>

With these expectations in mind, it is not surprising that mediation procedures in court-referred cases in Israel tend to be dominated by legal discourse, focus on the legal rights and duties of the disputants, and normalize an evaluative role of mediators.<sup>68</sup> ADR scholars have warned against the implications of such trends on the ability of parties to exercise

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<sup>61</sup> Meir Shamgar, *Arbitration—The Authority to Decide the Issue of Authority*, 1 LAW & BUS. 83, 84 (2004); see also Izhack Shilo, *Merging Arbitration into the Judicial System*, 8 BAR-ILAN LAW STUDIES 83, 83 (1990) (suggesting arbitration as a solution to the legal system case overload).

<sup>62</sup> Courts Law (Consolidated Version), § 79.C(a) (1984) (providing that mediation is a "process in which a mediator meets with the parties in order to bring them into an agreement on the resolution of the dispute, without having the authority to decide it").

<sup>63</sup> See e.g., Ronit Zamir, *The Two Projects of Mediation: The Mediation Between Hegemony and Empowerment*, 10 ALEI MISHPAT 3, 131 (2012) (Hebrew).

<sup>64</sup> The Committee on the Structure of Ordinary Courts in Israel REP, at 96–104 (1997).

<sup>65</sup> Att'y Gen. Directive 6.1203, *supra* note 36, at § 2.

<sup>66</sup> ALBERSTEIN, *supra* note 7, at 98.

<sup>67</sup> The Commission to Explore the Ways to Increase the Use of Mediation in the Courts REP, at 44 (2006) [hereinafter the "Rubinstein Committee"] (The Committee did recognize that mediation has other potential advantages such as the possibility of reaching creative outcomes to legal disputes.).

<sup>68</sup> Rabinovich-Einy, *supra* note 41.

free choice,<sup>69</sup> on the impartiality of mediators,<sup>70</sup> and on the future of mediation as a true alternative to the adversary legal system,<sup>71</sup> but the expectations of speedy settlements and the equation of success with mediated agreement maintain the dominance of the justice-as-efficiency perspective of ADR in Israel.

#### D. *Justice Beyond Efficiency*

Even before the Amendment to the Courts Law came into force in 1992, officially introducing ADR into the legal system for efficiency reasons, some commentators suggested that ADR, and in particular mediation, could offer disputants a better (rather than more efficient) way for solving legal disputes. One of the earliest Israeli law review articles on mediation, for example, noted that the advantages of mediation on the adversarial legal system include mediation's flexibility, mediation's contribution to better communication and efficient negotiation, and its potential for reaching creative solutions designed by the parties.<sup>72</sup> This justice-beyond-efficiency approach can be found in the writings of various Israeli academics who referred, among other things, to the potential of mediation to contribute to social change, promote mutual respect and understanding among individuals, enhance consent-based, individual decision-making without resort to the coercive powers of the state, and improve individuals' well-being.<sup>73</sup>

The justice-beyond-efficiency stance received official support within the legal system. For example, the Attorney-General's Directive on Mediation recognized, in addition to the savings of money and time, other potential benefits of the use of mediation in disputes in which the state is involved as a party, such as high quality of solutions tailored to the parties' needs, maintenance of relationships and future cooperation between parties, and increased public confidence in state and legal institutions.<sup>74</sup>

More importantly, in 2001, the Chief Justice of the Supreme Court, Justice Aharon Barak, argued that the purpose of mediation is more than reducing the number of open cases; its additional purposes are to change the litigious culture of Israeli society, making it a better place to live in, and to provide a means to solving differences by dialogue rather than by

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<sup>69</sup> See e.g., Omer Shapira, *The Paradox of Power in Mediation: Power and Weakness in the Relations between the Mediator and the Parties to Mediation*, 6 KIRYAT HAMISHPAT 371, 419-420 (2006) (Hebrew); Omer Shapira, *On Human Dignity in Mediation: The Effect of The Basic Law: Human Dignity and Liberty on Mediation*, 8 KIRYAT HAMISHPAT 373, 392-393 (2008) (Hebrew); Ruth Halperin-Kaddari & Bryna Bogoch, *The Voice is the Voice of Mediation, but the Hands are the Hands of the Law: Mediation and Divorce in Israel*, 49 HAPRAKLIT 293, 328, 331 (2007) (Hebrew).

<sup>70</sup> Omer Shapira, *On the Meaning and Justification of Mediators' Ethical Duty of Impartiality*, 28 BAR-ILAN LAW STUDIES 259, 284 (2012) (Hebrew); Ronit Zamir, *The Myth of Mediator Neutrality: from Impartiality to Equal Partiality*, 17 LAW & BUS. 411, 428 (2013) (Hebrew).

<sup>71</sup> Mordehai Mironi, *The Limitations of Settlement Conference and the Promise of Mediation*, 6 HAIFA U. L. REV., 487, 532-533 (2012) (Hebrew).

<sup>72</sup> Alroi, *supra* note 16, at 322-337, 338.

<sup>73</sup> DEUTSCH, *supra* note 57, at 8; Zamir, *Mediation in Public Affairs*, *supra* note 37, at 122-123; Omer Shapira, *Mediation and Therapeutic Jurisprudence: Looking at Mediation through the Therapeutic Lens*, 26 BAR-ILAN L. STUD. 379, 384-386 (2010) (Hebrew).

<sup>74</sup> Att'y-Gen. Directive 6.1203, *supra* note 36, at § 2.

the power of the courts.<sup>75</sup> He referred to a "mediation revolution" in Israel that could contribute to a social change in public discourse.<sup>76</sup>

Several months later, the Minister of Justice referred to mediation as a positive social phenomenon that gives cause for optimism, arguing that it is signaling a move from a culture of argument, harshness, and a resistance to the possibility of compromise and change of opinions that prevails everywhere - on the roads, in shopping centers, and in Government institutions, to a culture based on dialogue, attempts to understand others, and search for agreed, practical solutions.<sup>77</sup>

This *thicker* vision of ADR justice, advocated by senior legal officials (such as the Attorney General, the Chief Justice, and the Minister of Justice) was enthusiastically embraced by *out-of-court* ADR organizations and supporters. An Israeli Mediators' Association was established with goals such as the assimilation of the language of mediation in Israeli society and in the education system, and the introduction of mediation to the community.<sup>78</sup> The curriculum of basic mediator training courses has stressed the importance of dialogue, needs-discourse, and consensus-building over competitive negotiation practices, positions-discourse, and coercion. Academic programs were also established to examine the complex world of ADR beyond its capacity to ease the burden on the courts.<sup>79</sup> More generally we see ADR discourse spreading to a variety of areas outside the legal system, introducing ADR philosophy, language, and goals to community issues (e.g., living together with neighbors, minorities and immigrants), education (e.g., bringing ADR into nurseries and schools), and environmental issues (e.g., dealing with environmental conflicts and giving individuals voice in public decision-making processes). Some illustrations of justice-beyond-efficiency ADR discourse follow.

### 1. *Community Mediation*

In 2000, the Israeli National Center for Mediation and Conflict Resolution developed a community mediation and conflict resolution program for Israel, on the basis of experience accumulated in community mediation programs in the United States and England.<sup>80</sup> The program

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<sup>75</sup> Aharon Barak, *On Mediation*, 1 BEHASKAMA 4, 4 (2001) (Hebrew).

<sup>76</sup> *Id.* (noting that "Mediation is not just a profession. It is a philosophy of life . . . . Mediation is not just a technique. It is a culture of living together. Instead of coerced decisions . . . come consensual decisions . . . . In my view the ideal state is one in which the courts are involved in disputes that only judicial decree could resolve or disputes where a judicial decision is more appropriate. All other disputes - which are the vast majority of disputes brought today before the courts - should be addressed by social, extra-judicial structures of which mediation (along with other methods for dispute resolution) is a central element") (author's translation); see also Michael Ben-Yair, *Mediation as a Tool to Change the Face of the State*, (2002) 6 NEKUDAT GISHUR 14, 14-15 (Hebrew).

<sup>77</sup> Meir Shetreet, *Preface*, 2 BEHASKAMA 3 (2002) (Hebrew).

<sup>78</sup> See Israel Mediators' Association Call to Join the Association, <http://www.freelists.org/post/amot/gishur/1,111> (Hebrew).

<sup>79</sup> See e.g., The Interdisciplinary Program in Conflict Resolution, Management and Negotiation at Bar-Ilan University, <http://pconfl.biu.ac.il/en>; The International Program in Conflict Resolution and Mediation at Tel-Aviv University, <https://resolution.tau.ac.il/AboutUs>; The Swiss Center for Conflict Research, Management and Resolution at the Hebrew University, <http://crrm-en.huji.ac.il/>; The Program of Conflict Management and Resolution at Ben Gurion University, <http://in.bgu.ac.il/humsos/conflict/en/Pages/default.aspx>.

<sup>80</sup> Lee Li-On, *Community Mediation Theory and Practice* (Ministry of Justice, The National Center for Mediation and Conflict Resolution, 2000) (Hebrew).

envisioned mediation as a consensual process led by neutrals from the community, assisting members of the community to solve problems while retaining relationships.<sup>81</sup> Such a process, it was thought, would contribute to the quality of communication within the community, empower its members by enabling them to resolve their disputes by themselves, raise awareness to the possibility of resolving disputes through dialogue, and prevent disputes.<sup>82</sup>

With the assistance of the National Center for Mediation and Conflict Resolution, dozens of community mediation and dialogue centers evolved throughout Israel, often through cooperation between local authorities and volunteer mediators living in the community. The centers would then attempt to provide mediation services to their communities in a wide range of disputes, working in cooperation with community police, local authorities, schools, and youth organizations.<sup>83</sup>

ADR discourse in the context of community issues, which can be found in legal work/discourse, social work, management, and mediation literature, describes mediation as an opportunity to achieve *justice-beyond-efficiency* goals for Israeli society. It suggests that community mediation can bring true social change<sup>84</sup> and promote inter-cultural dialogue.<sup>85</sup> Scholars argue that mediation can help immigrants become part of Israeli society and overcome integration obstacles;<sup>86</sup> that it can assist handicapped employees, working in a special-needs factory, to have a voice and negotiate with a non-handicapped management;<sup>87</sup> that mediation may improve the relationship between the police and the public through the use of mediation in citizen complaints against police

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<sup>81</sup> *Id.* at 7.

<sup>82</sup> *Id.* at 8. The roles of community mediation centers according to the program were to provide mediation and conflict resolution services to the community; educate the community about mediation and consensual conflict resolution; develop a local network of interested stakeholders (such as the police, schools, the local authority) that would be involved in the process; conduct mediations within various ethnic groups that comprise of the community; operate mediation programs in the local education system; provide professional education programs to mediators; and engage in active and early intervention in conflicts. *Id.* at 26-27.

<sup>83</sup> See e.g., Ramat Hasharon Community Mediation and Dialogue Center, [http://www.migvanim.com/html5/?\\_id=9736&did=4455&g=9039&sm=9736&title=%EE%F8%EB%E6%20%E2%E9%F9%E5%F8%20%E5%E3%E9%E0%EC%E5%E2%20%E1%F7%E4%E9%EC%E4](http://www.migvanim.com/html5/?_id=9736&did=4455&g=9039&sm=9736&title=%EE%F8%EB%E6%20%E2%E9%F9%E5%F8%20%E5%E3%E9%E0%EC%E5%E2%20%E1%F7%E4%E9%EC%E4); Raanana Community Mediation and Dialogue Center, <http://www.raanana.muni.il/Residents/CommunityAndWelfare/CommunityWork/Pages/CenterMediationCommunityDialogue.aspx>; Ness Ziona Center for Mediation and Discussion in the Community, <http://www.nzc.org.il/?CategoryID=269>.

<sup>84</sup> Lee Li-On, *Mediation in the Community: True Social Change*, 8 NEKUDAT GISHUR 12, 12-13 (2003) (Hebrew).

<sup>85</sup> See e.g., Orna Shemer & Ela Bar-Guy, *Inter-cultural Mediation in the Community*, 14 MIFGASH: J. OF SOC.-EDUC. WORK 161 (2001) (Hebrew).

<sup>86</sup> See e.g., Lazar Brusilovski, *Perspectives on Integration - Research and Practice: Mediation Workshop for Immigrant Engineers - Outputs and Conclusions*, 88 HAD HA'ULPAN, Ministry of Education Publications (2005) (Hebrew), <http://cms.education.gov.il/EducationCMS/Units/AdultEducation/PirumeiAgaf/HedHaulpan/Gilayon88.htm>; Mamoya Zara, *The Effectiveness and Complexity of Cultural Mediation*, 7 ET HASADE 23, 23-25 (2011) (Hebrew), <http://din-online.info/per/eth.html>.

<sup>87</sup> See e.g., Esti Horowitz & Shirly Hemndinger, *Multi-Party Mediation between Persons with Disability and Persons without Disability*, (2008) 49 MEIDAOS: J. OF ISR. SOC. WORKERS ASS'N 51 (Hebrew).

officers;<sup>88</sup> that it can assist aging people with the problems of old age;<sup>89</sup> and that the kibbutz community could find it beneficial.<sup>90</sup>

## 2. Education

ADR discourse in the context of education is another illustration of a justice-beyond- efficiency discussion of ADR goals. Mediation and collaborative dialogue in the education system are considered important in view of the deep rifts and fundamental disagreements within Israeli society on political issues (e.g., between left and right on the issues of settlements or between Israeli Jews and Israeli Arabs on issues of fidelity to the state and equality), on the place of religion in public and private life, and on the rights of minorities in a democracy.<sup>91</sup> Israeli scholars portray mediation and similar programs based on principles of dialogue, cooperation, and consent as tools for educating a new generation of young individuals to be more tolerant to differing views and values, more respectful of others, less litigious and aggressive, and more collaborative in solving differences.<sup>92</sup> A large number of mediation programs have been introduced in nurseries, primary schools, and higher education institutions in order to spread the language and principles of collaboration and mediation, and to adopt consensual dialogue and problem solving to replace verbal and physical violence and coercion.<sup>93</sup> Many schools adopted mediation programs in order to facilitate conversations in the aftermath of the political murder of Prime Minister Itzhak Rabin by a right-wing extremist.<sup>94</sup> Hundreds of schools incorporated some form of mediation in order to achieve justice-beyond-efficiency goals such as combating violence, improving communication skills, and training young children in peaceful resolution of conflicts.<sup>95</sup> In addition, scholars note the

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<sup>88</sup> See e.g., Shulamit Kedem & Haviva Shefer, *Mediators*, 199 MAROT HAMISHTARA: ISR. POLICE J. 12, 12-13 (2004) (Hebrew); Rakefet Levin and Tami Nitsan, *Breaking Stereotypes*, 235 MAROT HAMISHTARA: ISR. POLICE J. 34, 34-35 (2010) (Hebrew).

<sup>89</sup> See e.g., Irit Fisher & Yuli Gut, *A Tool for Conflict Resolution in Old Age*, 117 DOROT MAGAZINE 30, 30-31 (2009) (Hebrew); Israel (Issi) Doron & Daphna Halperin, *There is an Alternative: Mediation as an Alternative Dispute Resolution for the Elderly*, 26 BAR-ILAN L. STUD. 463 (2010) (Hebrew).

<sup>90</sup> See e.g., Isaac Yanai, *Mediation is Suitable for the Kibbutz*, 124 NIHUL: ISR. MANAGERS MAG. 32 (1998) (Hebrew).

<sup>91</sup> See e.g., Aaron Kariv, *Now it is Academic: Orthodox and Secular Jews Learn to Live Together*, WALLA (Jul. 6, 2015, 3:00 PM), <https://judaism.walla.co.il/item/2870239> (religious and secular Jews participate together in a mediation course at Bar Ilan University); "Orthodox and Secular Jews Meet" (a project in Jerusalem that brings together orthodox and secular students to meet and study together); "Dialogue between Jews and Arabs in the Workplace" in SHATIL, THE NEW ISRAEL FUND, <https://www.shatil.org.il/node/99> (describing a model for conducting dialogue between Jews and Arabs in organizations) (Hebrew).

<sup>92</sup> See e.g., Ela Rave, *The Contribution of Peer-Mediation Program ("Mashkiney Shalom") to Pupils with Aggressive Patterns*, 9 HAYEOOTZ HACHINUCHI: J. OF THE ISR. ASS'N OF EDUC. COUNS., (2000) (Hebrew).

<sup>93</sup> See e.g., Sofia Naftalayev, Hanan Hamlet, & Orly Kot, *Mediation in A Youth Village*, 18 EFSHAR: J. OF THE NAT'L ASS'N FOR THE DEV. OF SOC. EDUC. IN ISR. 5, 5-6 (2008) (Hebrew); see also Ministry of Public Security, <http://cwv.gov.il/newsandupdates/pages/myehuda271114.aspx> (report on school children trained to be engaged as young mediators in school conflicts as part of a wider program titled "City Without Violence").

<sup>94</sup> See e.g., Ben-Yair, *The State of the Litigators*, *supra* note 25.

<sup>95</sup> See e.g., Tsafi Saar, *The Young Mediators Solve Every Disagreement*, 84 SHIUR HOFSHI: THE ISRAELI TCH.S' UNION MAG. [PINCITE] (2009) (Hebrew).

value of incorporating principles of collaborative dialogue and cooperation in education staff and parents contacts.<sup>96</sup>

### 3. *Environment*

Israeli discourse on environmental issues sees ADR in general, and mediation in particular, as a mechanism that can contribute to a less bureaucratic and informal

resolution of environmental conflicts, and to the promotion of environmental justice.<sup>97</sup> Justice, in this sense, means the involvement of communities in decisions that affect their lives, the sharing of resources by different segments of the community, and the protection of the environment for the benefit of the public and future generations while meeting the current needs of the population for housing, employment, shopping, and recreation.<sup>98</sup> For example, a quarry located in proximity to a community became the subject of a multi-party environmental mediation that addressed both the economic needs of the business and employees and the interests of the community to clean air and quiet.<sup>99</sup> In addition, environmental disputes, especially in Israel, often have a political dimension, which makes them highly inflammatory and complex.<sup>100</sup> Various initiatives seek to introduce mediation and collaborative dialogue into these sensitive geographic, environmental, cultural, and political conflicts for purposes that are beyond mere efficiency.<sup>101</sup>

### 4. *Complaints against Public Bodies*

The Ombudsman of Israel, who is also the State Comptroller, investigates complaints against government ministries, local authorities,

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<sup>96</sup> See e.g., Iris Manor-Binyamini, *Collaboration Between Interdisciplinary Teams and Parents in a Special Education Schools*, (2004) 19 ISSUES IN SPECIAL EDUC. & REHAB. 35 (2004) (Hebrew) (describing a study examining collaboration between experts and parents of children with special educational need).

<sup>97</sup> See e.g., Riki Halamish-Leshem & Irit, Amit-Cohen, *Mediation and Cultural Landscape: Conflict, Agreement and Social Impacts*, 78 HORIZONS IN GEOGRAPHY 82 (2012) (Hebrew) (a case study

describing the use of mediation in solving an environmental dispute in the north of Israel); see also Amitai Har-Lev & Daniel Friedberg, *Collaborative Dialogue and Consensus Building*, in WASTE MANAGEMENT IN ISRAEL; THE SAMUEL NEAMAN INSTITUTE FOR NATIONAL POLICY RESEARCH 35-46 (Hebrew), <https://www.neaman.org.il/Files/6-262.pdf> (suggesting tools for effective dialogue between stakeholders in environmental projects).

<sup>98</sup> See e.g., Michal Ben-Gal and Deborah Shmueli, *Applying Alternative Methods to the Management of Environmental Conflicts in Israel*, NAT'L ENV'L PRIORITIES OF ISR., Position Paper IV 1, 1-22 (2004) (Hebrew), <http://www.neaman.org.il/Neaman2011/Templates/showpage.asp?DBID=1&LNGID=2&TMI D=580&FID=964&IID=695>; Deborah Shmueli, *Environmental Justice in Israeli Reality*, 3 ECOLOGY & ENV'T 36 (2010) (Hebrew).

<sup>99</sup> Sigal Blumenfeld, *Mediation Process: Resolution of an Environmental Hazard*, 173 AGAMIT HAMAYIM BEARTSENU, WATER AUTH. MAG. 30, 30-31 (2005) (Hebrew) (describing a mediation between representatives of a quarry, the community, and the local authority).

<sup>100</sup> For example, Palestinians and Israelis who live next to each other have to share the same resources, and each community is affected by the behavior of the other. Likewise, many Bedouins, a subgroup within the Arab minority in Israel who still see themselves as part of a nomad tribal society based on agriculture, face the challenges of belonging to a modern state that wishes to settle them in officially recognized villages and cities. See e.g., Bedouins in the State of Israel, KNESSET, [https://www.knesset.gov.il/lexicon/eng/bedouim\\_eng.htm](https://www.knesset.gov.il/lexicon/eng/bedouim_eng.htm).

<sup>101</sup> See e.g., Zafrir Rinat, *First Environment Mediated Agreement in Israel*, WALLA, (Apr. 26, 2004, 10:39 AM), <http://news.walla.co.il/item/535730> (reporting on a mediation process between Palestinians and Israelis, including Bedouins) (Hebrew).



government companies, and other public bodies.<sup>102</sup> Anyone may submit a complaint to the Office of the Ombudsman if she has been directly injured by an authority, and the act was illegal, contrary to the rules of proper administration, or grossly unjust or excessively inflexible. The Office has discretion to investigate the complaint in any way it sees fit, and may demand any person or body to submit documents and information that may be useful for the investigation.

The flexibility of the investigation procedure enables the office of the Ombudsman to introduce mediation tools and mediation sessions into this procedure. Since 2008, the Ombudsman's office has carried out mediations in some complaints against public authorities. The mediators are employees of the Ombudsman's office who have been trained as mediators, and mediations take place at the Ombudsman's offices. The mediators employ various styles of mediation—pragmatic (problem-solving), transformative, and narrative—in a wide range of complaints.<sup>103</sup>

Some of the expected benefits of adding mediation to the toolbox of the Ombudsman go beyond the goals of efficiency and include improvement of relationships between the parties (thereby reducing the number of future complaints), empowerment of individuals, and improvement of communication.<sup>104</sup>

#### E. *Concerns about Justice and ADR*

The development of mediation in Israel has been accompanied by lively discourse over the dangers and risks associated with the use of ADR mechanisms and the implications of ADR use on justice issues. This section explores some of these concerns and their relation to justice.

##### 1. *The Qualifications of Mediators*

Mediation was hardly known of in Israel before 1992 when the Israeli legislature officially introduced mediation into the law.<sup>105</sup> In 1993, the Minister of Justice authorized the courts through Regulations to refer pending cases to mediation, but left open the question of the qualifications required of persons serving as mediators.<sup>106</sup> In 1996, new Regulations on Mediator Appointment authorized the Director of the Courts Administration to compile a list of mediators to which the courts may refer cases for mediation, and provided that the Director should appoint an Advisory Committee to the Minister of Justice to advise the Minister

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<sup>102</sup> See *Information Brochure*, THE STATE COMPTROLLER AND OMBUDSMAN OF ISRAEL, [https://www.mevaker.gov.il/he/Ombudsman/Guidecomplainant/Documents/ntz\\_english.pdf](https://www.mevaker.gov.il/he/Ombudsman/Guidecomplainant/Documents/ntz_english.pdf).

<sup>103</sup> For example, mediating refusal by a municipality to pay the complainant for professional services provided, conducting mediation of a complaint by a member of a minority group concerning a security check which left him humiliated, and mediating a complaint of a single mother with three children against a public housing company for failing to undertake requisite repairs. See Anat Kariv, Isaac Becker, & Shiri Milo-Loker, *Mediation and the Ombudsman: A Look to the Future*, 1, 22-25, (2012) available at the State Comptroller and Ombudsman of Israel, [www.mevaker.gov.il/he/Reports/Report\\_128/SummaryReport/summarypdf\\_2.pdf](http://www.mevaker.gov.il/he/Reports/Report_128/SummaryReport/summarypdf_2.pdf). For other examples of complaints which have been dealt with by the Ombudsman's office by way of mediation, see The Ombudsman of the State of Israel, Annual Reports 39 and 40, Special Topics, 118-25 (2015), [http://www.mevaker.gov.il/he/Reports/Report\\_300/e8828a8d-e966-4b63-af01-8ea391407bal/chap03.pdf](http://www.mevaker.gov.il/he/Reports/Report_300/e8828a8d-e966-4b63-af01-8ea391407bal/chap03.pdf).

<sup>104</sup> See Kariv, Becker & Milo-Loker, *supra* note 103, at 12-13.

<sup>105</sup> See Courts Law (Consolidated Version) § 70A(b) (1984) (Hebrew).

<sup>106</sup> See Courts Regulations (Mediation) 1993 (Hebrew).

on the qualifications and skills to be required of court-connected mediators.<sup>107</sup> The Committee, headed by Justice Gadot, published its report in 1998.<sup>108</sup> The Gadot Committee treated the qualifications of mediators as a matter of justice beyond efficiency, though it did not use that term explicitly. The Committee felt that setting minimum qualifications for mediators was necessary in order to protect both consumers (i.e., mediation parties) and the process of mediation, which had been making its first steps in Israel.<sup>109</sup> The Committee rejected the view, strongly advocated by the Israeli Bar, that lawyer-mediators need not undergo special mediation training.<sup>110</sup> Instead, they determined that all mediators in court-connected mediation programs had to undertake training courses, approved by the Committee, whose content included both theoretical and practical aspects of mediation.<sup>111</sup>

Following the Gadot Committee report, the Mediator Appointment Regulations were amended to provide that a mediator on the courts' list must have an academic degree, working experience of at least five years in his professional field, and must take a forty-hour basic mediation training course or sixty-hour family mediation training course.<sup>112</sup> In another report, the Gadot Committee delved into the *content* of these courses, and the Reports' recommendations became the field's standard for mediators' training in Israel, both for court-connected and out-of-court mediators.<sup>113</sup>

The list of mediators attracted much *justice-beyond-efficiency*-related criticism. On the one hand, a *competence* issue became apparent: the list included thousands of names of persons who were eligible to be included on the list simply because they completed forty to sixty-hour training courses but in fact had no actual mediation experience and did not see mediation as a vocation. On the other hand, the criticism raised a *just-distribution* issue: many persons on the list who wished to pursue a career in mediation found that the courts largely disregarded the list because judges had no meaningful way of choosing between the names on the list and therefore referred cases to a small group of mediators known to them.<sup>114</sup>

The Rubinstein Committee (2006), which reviewed the ways to increase the use of mediation in the courts, noted that one of the reasons for the slow development of mediation in Israel was the dissatisfaction of disputants and lawyers over the professional competence of the mediators and negative experience of participants in mediation.<sup>115</sup> The Rubinstein Committee sought to change that by the creation of a relatively *small* roster of professional and experienced mediators eligible to mediate court-referred cases. These mediators were to be selected through a

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<sup>107</sup> See Courts Regulations (Mediator Appointment) 1996 (Hebrew).

<sup>108</sup> See *The Gadot Report*, *supra* note 32

<sup>109</sup> *Id.* at 6. This may also be considered as an efficiency goal designed to increase the number of mediation users.

<sup>110</sup> See *id.* at 14-20.

<sup>111</sup> See *id.*

<sup>112</sup> See Courts Regulations, *supra* note 107.

<sup>113</sup> See *id.*

<sup>114</sup> Harel Abraham, *On the Nomination of a Mediator by the Court and on Public and Mediators' Confidence in the Courts*, ISRAEL BAR ASS'N (2004), [http://www.israelbar.org.il/article\\_inner.asp?pgId=13570&catId=287](http://www.israelbar.org.il/article_inner.asp?pgId=13570&catId=287); Halperin-Kaddari & Bogoch, *supra* note 68, at 304.

<sup>115</sup> The Rubinstein Committee, *supra* note 67, at 9, 25.

public bid, were to participate in continuing education activities, and were to be subject to an evaluation program.<sup>116</sup>

The plan succeeded to some extent but raised *new* justice-related issues.<sup>117</sup> The new legal regime irritated many mediators who felt that the state unduly restricted their freedom of occupation and their prospects to practice mediation for a living.<sup>118</sup> Legal actions before the Israeli High Court of Justice put pressure on the government, and in 2008, the Regulations on the courts' list of mediators were cancelled.<sup>119</sup> Since then, there have been no official criteria for minimum qualifications required of mediators; though in practice, the Gadot Committee standards for mediators' qualifications and training remained the standard of the field.<sup>120</sup>

This year, the new Courts Regulations (Mediators' List) 2017 entered into force, creating stringent criteria for court-connected mediators, including participation in a supervised practicum, demonstration of evidence of actual experience in mediation, and successful completion of a professional evaluation process.<sup>121</sup> The debate in Israel over the qualifications of mediators and access to the emerging new profession is likely to continue.

## 2. *Abuse of Process, Power Issues, and Ethics*

The reception of mediation in the Israeli legal system was met with concerns that the process might harm some of its users. For example, Israeli commentators, writing on *divorce* mediation, recognized the current disparities of power between men and women and noted the dangers (referred to in ADR literature) that mediation could enhance men's power and produce inferior settlement terms for women.<sup>122</sup> These concerns are particularly relevant and disturbing in Israel because divorce law in Israel is based on religious norms that treat women and men unequally and enhance men's power.<sup>123</sup>

Looking at *discrimination* cases at the workplace, other commentators pointed to the hegemony of evaluative mediation in Israel and argued that Israeli policy makers should be aware that evaluative mediation is not suitable to some cases, such as discrimination disputes, and that allowing these cases to be mediated exposes disempowered parties to an increased risk of abuse.<sup>124</sup>

Making a more general claim, another commentator pointed to the gap between the mediation myth that mediation is a voluntary, consent-based process, and the reality of documented mediator practices that undermine party self-determination, manipulate information, and fail to

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<sup>116</sup> *Id.* at 49-50.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> See Courts Regulations (Mediators' List) 2017, [https://www.nevo.co.il/law\\_word/Law01/501\\_703.doc](https://www.nevo.co.il/law_word/Law01/501_703.doc).

<sup>122</sup> See Ruth Halperin-Kaddari, Bryna Bogoch, & Yael Ronen, *Gender and Divorce Mediation in Israel*, 7 HAMISHPAT 335, 337 (2007) (Hebrew).

<sup>123</sup> See *id.*

<sup>124</sup> See Faina Milman Sivan & Orna Rabinovich-Einy, *Mediating Procedure and Substance: On the Privatization of the Justice System and Equality at Work*, 11 LAW & GOVERNMENT 517, 542-543 (2008) (Hebrew).

prevent process abuse.<sup>125</sup> Yet another commentator, writing on the importance of informed consent in mediation (which is closely connected to fairness considerations)<sup>126</sup> felt that Israeli mediation law was not clear enough with regard to mediators' obligations to obtain the parties' *informed consent* regarding the risks of mediation, the use of separate meetings, the identity of the mediator, the style of mediation, and the mediation outcome.<sup>127</sup>

Commentators have noted that Israeli mediators have little guidance on the *ethics* of mediation practice. Some guidance can be found in the Court (Mediation) Regulations that refer to fundamental duties of court-connected mediators, but the language of the regulations is abstract and laconic, leaving much to the interpretation and discretion of the mediator. Moreover, the Regulations formally apply to court-connected mediations, leaving private mediations largely unregulated.<sup>128</sup>

Raising justice-beyond-efficiency concerns relating to the *fairness* of mediation procedures, commentators warned that the Regulations do not provide for a robust obligation of mediators to respect the parties' right to self-determination;<sup>129</sup> leave too much discretion to the mediator in deciding whether she is in a conflict of interests;<sup>130</sup> fail to explain the meaning of impartiality in the context of conducting a mediation, thereby weakening the duty of impartiality;<sup>131</sup> and fail to adequately protect the confidentiality of mediation communications.<sup>132</sup> The absence of clear ethical guidelines and the high level of mediator discretion led commentators to question the appreciation of mediators of their professional role and its limits,<sup>133</sup> to criticize the lack of appropriate guidance to mediators on the ways to address inequalities of power between disputing parties,<sup>134</sup> and to wonder about the accountability of mediators to mediation outcomes.<sup>135</sup>

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<sup>125</sup> See OMER SHAPIRA, *USE OF POWER AND INFLUENCE IN MEDIATION: PRACTICE AND APPLIED ETHICS*, 8-12 (Academic College Press, 2007) (Hebrew).

<sup>126</sup> See e.g., Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L REV. 775, 787 (1999) (noting that "[i]n mediation practice, the principle of informed consent is not an end in itself but is a means of achieving the fundamental goal of fairness.").

<sup>127</sup> See Orna Deutsch, *On Informed Consent in Mediation*, 3 SHAAREY MISHPAT 47, 57-58, 60-61, 64-66 (2006) (Hebrew).

<sup>128</sup> See SHAPIRA, *USE OF POWER*, *supra* note 125, at 286-87; Ottolenghi, *supra* note 18, at 28.

<sup>129</sup> See e.g., Shapira, *Human Dignity*, *supra* note 69, at 383-85. See also DEUTSCH, *supra* note 57, at 166 (arguing that separate meetings should take place with the parties' consent).

<sup>130</sup> *Id.* at 132-33.

<sup>131</sup> See e.g., Shapira, *On the Meaning and Justification of Mediators' Ethical Duty of Impartiality*, *supra* note 70, at 261-62.

<sup>132</sup> See e.g., Limor Zer-Gutman, *Ensuring Confidentiality in Mediation*, 3 SHAAREY MISHPAT 165 (2002) (Hebrew); Ronit Zamir, *The Confidentiality Between the Mediator and the Parties to Mediation*, in JUDGE URI KITTAI BOOK 45 (Boaz Sangero ed., 2007) (Hebrew).

<sup>133</sup> See e.g., Rabinovich-Einy, *supra* note 41, at 49-50 (noting the vagueness of the norms regulating mediation and the costs in terms of the quality of the process and outcomes); see also Michal Alberstein, *On Hastiness and Procedural Justice at Tel Aviv Labor Court: Observations of Mediations and Litigations*, 7 MAAZANEI MISHPAT 119, 129-131 (2010) (Hebrew) (noting the excessive use of evaluative techniques by mediators).

<sup>134</sup> See e.g., Shapira, *On the Meaning and Justification of Mediators' Ethical Duty of Impartiality*, *supra* note 70, at 282-83; see also DEUTSCH, *supra* note 57, at 138-39.

<sup>135</sup> See e.g., DEUTSCH, *supra* note 57, at 106, 113; see also Peretz Segal, *The Morality Sense of the Mediator*, 3 BEHASKAMA 3 (2002) (Hebrew) (referring to an urgent need to promote an ethical code for mediators).

### 3. *Mandatory Mediation and Access to the Court*

The small number of mediations of legal cases in Israel led the court system to consider introducing mandatory mediation as a precondition to adjudicating civil cases.<sup>136</sup> This initiative was criticized on various grounds. One justice-beyond-efficiency based objection was that mandating pre-trial mediation sessions undermines disputants' right to *access the court*.<sup>137</sup> It was argued that disputants have a right to have their case adjudicated by a judge rather than mediated by a mediator, and that mandatory mediation could increase the expenses of the disputants in cases in which the mediation failed to resolve the dispute and the disputants had to pay for the costs of litigation on top of the costs of mediation.<sup>138</sup> The response of the Rubinstein Committee to these concerns was to recommend the adoption of a soft form of mandatory pre-mediation session (MAHUT) that provides parties with information about mediation rather than imposing on them a duty to mediate.<sup>139</sup>

Another justice-beyond-efficiency-based objection was that mandatory pre-mediation sessions in civil cases could adversely affect *disempowered* disputants in particular.<sup>140</sup> First, it was argued that the requirement to go through an additional process before having the right to be heard by a court would intensify inequalities of power and drive weaker parties to make unjustified concessions and settle.<sup>141</sup> Second, it was suggested that since mediation in Israel follows a rights-oriented evaluative model, disempowered disputants that are unrepresented and less familiar with their legal rights will not be able to fully participate in the process, voice their non-legal concerns and needs, nor take an active role in the design of a creative outcome. Moreover, as disempowered disputants may rely more on the mediator and are often not in a position to second guess the mediator's evaluations, which are not necessarily accurate, they will therefore be more inclined to accept inferior offers to settle.<sup>142</sup>

### III. REVIEW OF ASSESSMENTS OF ADR INITIATIVES WITH A FOCUS ON ACHIEVEMENT OF JUSTICE

This Section looks into scholarship, parliamentary and governmental reports, and other publicly available information in an attempt to assess the degree to which the ADR justice goals discussed in Section II have been achieved. It should be appreciated, however, that direct evaluative research of ADR initiatives in Israel is relatively scarce. In consequence, ancillary resources had to be identified and relied upon, rendering the

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<sup>136</sup> See Rabinovich-Einy, *supra* note 41, at 43, and accompanied text; Israel Civil Procedure Regulations, *supra* note 44.

<sup>137</sup> The Rubinstein Committee, *supra* note 67, at 19, 41.

<sup>138</sup> See *id.* at 19.

<sup>139</sup> See *id.* at 44–45. However, the Committee thought that requiring parties to participate in pre-trial mediation could be a justified limitation of the right of access to the court because the disputants were not under a duty to reach a resolution of the dispute and could withdraw from the mediation and litigate their case. *Id.* at 19.

<sup>140</sup> See, e.g., Rabinovich-Einy, *supra* note 41, at 51–52.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

assessment of ADR justice goals incomplete, and revealing the need for more research in the future.

A. *Efficiency Goals of Justice*

1. *Do ADR methods ease the burden on the courts?*

The burden on the Israeli legal system is very high, with an Israeli judiciary of about 600 judges dealing with over 1,000,000 cases a year.<sup>143</sup> While the number of judges has increased steadily over the past decades beyond the population growth rate—from 280 judges in 1989 to approximately 440 judges in 1999 and 600 judges in 2009—the demand for judicial services has increased as well, intensifying the burden on the courts.<sup>144</sup> In 2015, 666 judges dealt with 762,055 new cases and 446,008 pending cases from previous years.<sup>145</sup>

Research on the Israeli legal system suggests that 15% of all cases (civil and criminal) are fully heard and result with a judgment while the rest are resolved in compromise, plea bargains, and other ways.<sup>146</sup> However, the introduction of ADR to the Israeli legal system has not eased the pressure on the civil courts because the use of ADR mechanisms remains low. For example, the number of first instance civil and commercial litigious pending cases in 2012 was 337,154 and in 2014 was 344,349,<sup>147</sup> showing an increase of 2% in the number of pending cases. However, the number of cases referred to the MAHUT program in 2012 was only 6,782 with 2,595 cases continuing to the mediation phase, and in 2014 there were 7,041 referred cases with 2,326 cases continuing to the mediation phase.<sup>148</sup>

Data from the Israel Bar Association National Mediation Institute on the number of cases referred by the courts for mediation is similarly striking: in 2012 the Institute received only 1,015 cases with 471 cases continuing to mediation,<sup>149</sup> and in 2014 984 cases with 431 cases continuing to mediation.<sup>150</sup>

There is no national comparable research-data on the number of cases referred to *arbitration*, but lawyers, judges, and ministerial officials agree that it is insignificant.<sup>151</sup> Information provided by private arbitration

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<sup>143</sup> See The Israel Judiciary Authority Annual Report 2015, 9, 11, (2015), [https://www.gov.il/BlobFolder/reports/statistics\\_annual\\_2015/he/annual2015.pdf](https://www.gov.il/BlobFolder/reports/statistics_annual_2015/he/annual2015.pdf); see also Mironi, *Mediation*, *supra* note 12, at 175.

<sup>144</sup> See Suciu, *supra* note 25, at 2.

<sup>145</sup> See The Israel Judiciary Authority Annual Report 2015, *supra* note 143, at 9, 11.

<sup>146</sup> See Keren Weinsall-Margel et al., *Creating a Case Weight Index for Measuring Judicial Workload*, 44 MISHPATIM [HEBREW U. L. REV.] 769, 773 (2015) (Hebrew).

<sup>147</sup> See European Commission for the Efficiency of Justice, *European Judicial Systems Efficiency and Quality of Justice: CEPEJ Studies No. 23*, 197 (2016), <https://rm.coe.int/european-judicial-systems-efficiency-and-quality-of-justice-cepej-stud/1680786b58>

<sup>148</sup> E-mail from Nathalie Levy, Head of Mediation Unit, Israeli Court Admin. to author (Sept. 3, 2017) (on file with author).

<sup>149</sup> See Israel Bar Association Activity Report for 2012, ISRAEL BAR ASS'N 28 (2012) (Hebrew), [http://www.israelbar.org.il/uploadfiles/2012\\_site.pdf](http://www.israelbar.org.il/uploadfiles/2012_site.pdf) [hereinafter "Israel Bar Association Activity Report for 2012"].

<sup>150</sup> See Israel Bar Association Activity Report for 2014, ISRAEL BAR ASS'N 29 (2014) (Hebrew), [http://www.israelbar.org.il/uploadfiles/activity\\_report\\_2014\\_site.pdf](http://www.israelbar.org.il/uploadfiles/activity_report_2014_site.pdf) [hereinafter "Israel Bar Association Activity Report for 2014"].

<sup>151</sup> See, e.g., Pinchas Mariinsky, Chairman of the Arbitration Institute of the Israel Bar Association, Conference on the Policy of the Courts and the State with Regard to Arbitration (2014) (Hebrew), [http://www.israelbar.org.il/article\\_inner.asp?pgId=200083&catId=2133](http://www.israelbar.org.il/article_inner.asp?pgId=200083&catId=2133)

institutes supports this view. For example, the Center for Arbitration and Dispute Resolution conducted 55 arbitrations in 2008 and about 140 arbitrations in 2009, the Israeli Institute of Commercial Arbitration conducted an average of 80 arbitrations a year between 2005 and 2010,<sup>152</sup> and the Israel Bar Association Institute of Arbitration conducted an average of 120 arbitrations per year between 2009 and 2015.<sup>153</sup>

Research found that between 1989 and 1999 the tendency of litigants to settle differences using ADR was very low and the authors concluded that the policy of introducing ADR into Israel had not succeeded and had not achieved its purpose, i.e. did not encourage litigants in Israel to use ADR processes.<sup>154</sup> The introduction of pre-mandatory mediation sessions (MAHUT) in civil and family cases and the efforts to enhance the quality of mediators are designed to increase the use of mediation in the legal system in the future.

2. *Is mediation efficient in terms of resolving cases?*

It is often argued that the sole criterion for mediation success in Israel, as far as the justice system is concerned, is the number of cases resolved and taken away from the courts' dockets.<sup>155</sup> An evaluation report of the mandatory pre-mediation sessions scheme (MAHUT) from 2009 found a high rate of participants' satisfaction with 50% of mediations concluded with an agreement.<sup>156</sup> Data collected by the Mediation Unit in the Israeli Courts Administration shows an increasing rate of mediated agreements: 48% of MAHUT mediations in 2012 resulted with an agreement, 55% in 2013, and 59% in 2014 and 2015.<sup>157</sup> Available data from the Israel Bar Association's National Mediation Institute reveals a similar pattern with the rate of mediated agreements increasing from 59% in 2010 to 69% in 2014.<sup>158</sup> The success of the MAHUT pilot and the continuous pressures towards efficiency resulted in a comprehensive reform in the Civil

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(noting that "[a]rbitration procedures are a practical solution for continuation of the proceedings in court. In practice, however, the number of cases referred to arbitration every year is insignificant . . .") (author's translation); *see also*, 18th Knesset Constitution, Law and Justice Committee, Protocol 526 discussing Bill Proposal for Mandatory Arbitration, (Jan. 10, 2012) (Hebrew),

<http://main.knesset.gov.il/Activity/committees/Pages/AllCommitteeProtocols.aspx?ItemID=427750> (President of the Israeli Institute of Commercial Arbitration, Judge (retired) Amnon Strashnov noting that the state refrains from resolving disputes through arbitration despite a 2009 amendment to an Attorney General directive that referred to arbitration as a legitimate dispute resolution mechanism in appropriate cases to which the state is a party).

<sup>152</sup> See Hila Raz, *Gleaming Arbitrator, Quick Decision-Making – The Privatization of Courts is Already Here*, Marker (Feb. 25, 2010, 7:04 AM) (Hebrew), <http://www.themarker.com/law/1.578018>.

<sup>153</sup> See Israel Bar Association Activity Report for 2014, *supra* note 150, at 26; Israel Bar Association Activity Report for 2013, ISRAEL BAR ASS'N 24 (2013) (Hebrew), [http://www.israelbar.org.il/uploadfiles/activity\\_report\\_2013\\_site.pdf](http://www.israelbar.org.il/uploadfiles/activity_report_2013_site.pdf); Israel Bar Association Activity Report for 2012, *supra* note 149, at 25; Israel Bar Association Activity Report for 2011, Israel Bar Ass'n 24 (2011) (Hebrew), [http://www.israelbar.org.il/uploadfiles/annual\\_report\\_2011\\_site.pdf](http://www.israelbar.org.il/uploadfiles/annual_report_2011_site.pdf); Israel Bar Association Activity Report for 2010, ISRAEL BAR ASS'N 30 (2010) (Hebrew), [http://www.israelbar.org.il/uploadfiles/2010\\_site\\_new.pdf](http://www.israelbar.org.il/uploadfiles/2010_site_new.pdf).

<sup>154</sup> See Moshe Barniv & Ran Lachman, *The Tendency Towards ADR in the Perspective of Time and Regulation*, 2 LAW & BUS. 209 (2005) (Hebrew).

<sup>155</sup> See e.g., Mironi, *Mediation*, *supra* note 12, 208.

<sup>156</sup> See Rabinovich-Einy, *supra* note 41, at 44.

<sup>157</sup> E-mail from Nathalie Levy, *supra* note 148.

<sup>158</sup> See Israel Bar Association Activity Report for 2010, ISRAEL BAR ASS'N 39 (2010) (Hebrew), [http://www.israelbar.org.il/uploadfiles/2010\\_site\\_new.pdf](http://www.israelbar.org.il/uploadfiles/2010_site_new.pdf); Israel Bar Association Activity Report for 2014, *supra* note 150.

Procedure Regulations that will make mandatory pre-mediation sessions compulsory in almost all civil cases.<sup>159</sup>

B. *Justice Goals Beyond Efficiency*

1. *Is mediation being used to achieve goals beyond case dismissal?*

While mediation styles vary, some styles are more outcome-driven than others. Problem-solving mediation is designed to achieve outcomes, thus making it by definition more outcome-oriented than transformative and narrative mediation, which are more process-oriented.<sup>160</sup> However, problem-solving mediation has its own sub-styles, with facilitative mediation, which is needs-based and focuses on constructive communication, and evaluative mediation, which is rights-based and more outcome-oriented.<sup>161</sup> The nuances between the facilitative and evaluative styles can be dramatic notwithstanding their shared ideal of reaching mediated agreements.<sup>162</sup> For example, facilitative mediators will tend to adopt a wide understanding of the meaning of party self-determination, prefer active participation of the parties in the mediation, favor direct communication between parties over separate meetings, encourage the parties to bring their extra-legal needs and interests into the room, and assist the parties to arrive at extra-legal, creative solutions.<sup>163</sup>

Israeli commentators have observed that the problem-solving mediation style, especially the evaluative type with its focus on legal rights, speed, and resolution, has become the dominant style of mediation in Israel, leaving very little place for other styles of mediation to evolve.<sup>164</sup> For example, observations of in-house mediation sessions in the Tel-Aviv Labor Court between the years 2007–2009 found that most mediators tended to employ directive and evaluative techniques, to push disputants to make concessions and settle without allowing much place for disputants' voice, and to equate their success with reaching settlements.<sup>165</sup> The leading researcher identified the main problem of the observed proceedings as haste: when mediators are expected to settle cases quickly and operate under constant time pressures and time constraints, it results in a sacrifice of justice in terms of listening to disputants (voice), respect, and neutrality.<sup>166</sup> In addition, research of *divorce mediation* in Israel showed that the nature of divorce mediation and the styles of mediation employed by individual mediators were highly influenced by the legal system.<sup>167</sup> Thus, despite the fact that mediators came from different backgrounds and occupations, the researchers noted that it seemed that the standards for family disputes outcomes were set by the legal system and the law, thereby undermining the full potential of mediation as a process that seeks goals beyond efficiency.<sup>168</sup>

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<sup>159</sup> See Rabinovich-Einy, *supra* note 41, at 36–37; Courts Regulations (Mediators' List) 2017, § 37.

<sup>160</sup> See SHAPIRA, *MEDIATORS' ETHICS*, *supra* note 6, at 94–101.

<sup>161</sup> *See id.*

<sup>162</sup> *See id.*

<sup>163</sup> *See id.*

<sup>164</sup> See Milman Sivan & Rabinovich-Einy, *supra* note 124, at 532–33.

<sup>165</sup> See Alberstein, *On Hastiness and Procedural Justice*, *supra* note 133, at 127–131.

<sup>166</sup> *See id.* at 140.

<sup>167</sup> See Halperin-Kaddari & Bogoch, *supra* note 69, at 331.

<sup>168</sup> *See id.* at 300, 332.



A more positive evaluation is found in a study conducted from 2012 to 2013 in the Family Court Assistance Units (FCAU).<sup>169</sup> The FCAU were founded in 1997 to assist families who initiate legal proceedings for divorce, allegations of domestic violence, child custody, visitation arrangements, and alimony in the Family Courts.<sup>170</sup>

The FCAU workers have a therapeutic orientation: they operate under the Ministry of Social Work and Social Services, most of them are social workers, they provide services free of charge, and they seek to assist the families through therapeutic discourse that addresses emotional needs and the effects on the children and promotes dialogue.<sup>171</sup> The FCAU workers employ a variety of intervention methods including personal and couple counseling, short term therapy, group intervention, mediation, and dispute resolution.<sup>172</sup> According to the study, the main intervention method was short-term mediation (3–4 sessions) provided to about 65% of the families.<sup>173</sup> The findings of the study could be viewed as a modest attempt to use mediation not only for efficiency purposes but for justice-beyond-efficiency goals as well. The study found that 73% of the clients were highly satisfied with the service, 68% reported that they would recommend the service to others, 23% of the clients believed that the intervention had improved relationships between them and the other party in the conflict, and 48% reported that they reached an agreement in at least one area of conflict.<sup>174</sup>

Still, another commentator recently argued that Israel has failed to realize the personal, social, and educational promises of mediation—its capacity to cause parties participating in the process to experience personal transformation and growth and its cumulative effect on society at large in creating a less contentious society.<sup>175</sup>

## 2. *To what degree have community mediation's goals of justice been achieved?*

Are Community Mediation and Dialogue Centers successful in engaging the community in their activities? In attracting members of the community to use their services and solve differences through dialogue? In promoting inter-cultural dialogue and tolerance?

Twenty years ago there were two community mediation centers in Israel.<sup>176</sup> In 2012 there were twenty-seven,<sup>177</sup> and thirty-five in 2016.<sup>178</sup> The centers rely primarily on the work of volunteers with the director of the center the only salaried worker, often on a part-time basis as well.

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<sup>169</sup> See TALI BAYER-TOPILSKY ET AL., FAMILY COURT SOCIAL SERVICES—NATIONAL EVALUATION STUDY, (Myers-JDC-Brookdale Institute Publications ed. 2015), [https://brookdale.jdc.org.il/wp-content/uploads/2018/01/702-15\\_Hebrew\\_report.pdf](https://brookdale.jdc.org.il/wp-content/uploads/2018/01/702-15_Hebrew_report.pdf) (Hebrew).

<sup>170</sup> See, e.g., Anat Inbar et al., *Social Services Units Ancillary to the Family Courts—A Decade of Action*, 2 THE FAMILY IN LAW 25, 29-31, 37 (2008) (Hebrew), <http://www.mishpat.ac.il/files/650/2911/2917/2918.pdf>.

<sup>171</sup> See *id.* at 31-33.

<sup>172</sup> See *id.* at 37.

<sup>173</sup> See BAYER-TOPILSKY ET AL., *supra* note 169, at 3.

<sup>174</sup> See *id.* at i–vi.

<sup>175</sup> See Mironi, *Mediation*, *supra* note 12, at 206–11.

<sup>176</sup> See *A Map of the State of Mediation in Israel*, *supra* note 48.

<sup>177</sup> See Orit Yulzary, *Initiation and Establishment of Community Mediation and Dialogue Centers*, in COMMUNITY MEDIATION AND DIALOGUE CENTERS: SOCIAL INNOVATION THROUGH COMMUNITY INITIATIVES 86 (Orna Shermer ed., 2013) (Hebrew).

<sup>178</sup> See Gishurim Program, *supra* note 49.

Most centers receive some financial support from the local authority and are struggling to survive in a climate of budgetary cuts.<sup>179</sup>

The centers rely to a large degree on the courts as their major providers of work, and referral of cases from other stakeholders in the community is relatively low.<sup>180</sup> Their reliance on the courts exposes the centers to the justice-as-efficiency ideology and to the race for agreements, which serve as a dominating criterion for success.

Still, there are attempts to utilize mediation in a *less legalized context* with other, beyond-efficiency visions of justice. In the absence of comprehensive research of community mediation in Israeli literature, there is only anecdotal evidence of these attempts. For example, the mediators of Kiryat-Ono Mediation and Dialogue Center have organized meetings with employees of the local authority, workers of the municipality call-center, and local police officers, in which they informed them of the principles of mediation and the mediation center's services.<sup>181</sup>

A mediator in another Community Mediation and Dialogue Center situated in the south of Israel described the center's activities in one particular neighborhood.<sup>182</sup> The neighborhood was populated by people of different cultures and low income, and suffered from physical neglect, tense relationships, and a high volume of neighbor disputes.<sup>183</sup> The Community Center, together with the municipality, entered the neighborhood in an attempt to empower the residents, promote collaboration, open constructive roots of communication, and help the residents to change their physical and mental environment.<sup>184</sup> The mediators helped the residents of one complex of apartments, and later others, to convene, discuss common issues that mattered to them such as noise and trash hazards, elect representatives, make decisions on goals, and take actions.<sup>185</sup> The mediator reported that some residents responded positively to the mediators' interventions, and slowly a group of residents formed and started to take responsibility for the daily life of the neighborhood.<sup>186</sup> In addition, the mediators helped residents solve local conflicts, such as those between neighbors or landlords and tenants, through dialogue.<sup>187</sup>

Another community mediator described the collaboration between the police and the Community Mediation and Dialogue Center in her

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<sup>179</sup> See Orna Shemer, *Summary and an Invitation for a Journey*, in COMMUNITY MEDIATION AND DIALOGUE CENTERS: SOCIAL INNOVATION THROUGH COMMUNITY INITIATIVES 316 (Orna Shemer ed., 2013) (Hebrew).

<sup>180</sup> See, e.g., Zamir, *supra* note 63, at 150. For example, in 2015 the mediators of Kiryat-Ono Mediation and Dialogue Center mediated 48 legal cases, referred to the center from the court, and 8 community cases referred by other stakeholders. E-mails from the Director of the Kiryat Ono Mediation and Dialogue Center to author (Apr. 25, 2017 & May 4, 2017) (on file with author).

<sup>181</sup> E-mails from the Director of Kiryat Ono Mediation and Dialogue Center, *supra* note 180.

<sup>182</sup> See Sharon Delman, "The Mediation and Dialogue Center Goes to the Neighborhood," in COMMUNITY MEDIATION AND DIALOGUE CENTERS: SOCIAL INNOVATION THROUGH COMMUNITY INITIATIVES 109 (Orna Shemer ed., 2013) (Hebrew).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> See e.g., Shalom Levy, Ofira Rubinstein, Moshe Katby & Orna Shani, "From a Few 'Crazies' to a Community Mediation Center to a Regional Mediation Center," in COMMUNITY MEDIATION AND DIALOGUE CENTERS: SOCIAL INNOVATION THROUGH COMMUNITY INITIATIVES 117 (Orna Shemer ed., 2013) (Hebrew).

city.<sup>188</sup> It seems that Community Mediation Centers in Israel are still in a process of formation: new centers are formed while existing centers are still struggling to attract supporters, resources, and users.<sup>189</sup> In many cases, the driving force behind these local initiatives are a few individuals who are very passionate about the promise of mediation and dialogue and are willing to commit incredible amounts of time and energy, without matching monetary remuneration, to promote the idea of mediation and recruit others to spread it to the benefit of the community.<sup>190</sup> The reliance on a few individuals in the initiation, development, and distribution of community mediation makes it vulnerable to changes in personnel.<sup>191</sup> The thriving center may fall into inactivity once its charismatic leader leaves or when its local political benefactor steps down from power.<sup>192</sup> It is clear that without systematic support from local and central government, community mediation will find it hard to develop further and achieve its justice-beyond-efficiency goals. Furthermore, in the absence of more research on community mediation and the centers' activities, it will be difficult to assess their success and attract more support for this important project.

3. *Has Israeli society assimilated a culture of mediation? Is the assimilation of a culture of tolerance, dialogue, and collaboration within the education system successful?*

In 2001, Chief Justice Aharon Barak said in a lecture on the opening of the Israel Bar Association's Mediation Institute that, "mediation did not come to solve the problems of the courts. It came to solve the problems of society."<sup>193</sup> If the mediation revolution succeeds, he said, "The culture of mediation will become part of our general culture, and a central element in public discourse."<sup>194</sup> Is Israel a less litigious society today? Is it less aggressive? Is it based today more than in the past on dialogue and respect? Have these social, justice-beyond-efficiency goals realized?

In 2003, a policy paper of the Israel Democracy Institute noted that "according to repeated public opinion surveys, most Israelis attach to 'who is an Israeli' mainly qualities of rudeness, intolerance, incivility and

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<sup>188</sup> See Shira Figelson, "The Acamol, Surgeon and Professor: Partnership between the Community Mediation and Dialogue Center and the Police", in *COMMUNITY MEDIATION AND DIALOGUE CENTERS: SOCIAL INNOVATION THROUGH COMMUNITY INITIATIVES* 157 (Orna Shemer ed., 2013) (Hebrew). The local police station realized that police officers are called to intervene in a large number of neighbor disputes which repeat themselves and cannot be resolved by classic police work. *Id.* at 162. The partnership with the mediation center evolved in order to reduce the workload on the police and offer a better response to these disputes with the help of local mediators who are brought into the dispute. *Id.* The mediator summarized two years of joint work with some degree of optimism, noting that "[t]oday it seems that community police officers in [our city] have internalized the importance of mediation and its effectiveness in resolving community disputes. When community police officer is faced with disputes, mediation is one of the first alternatives he considers... [the police officers] indicate that they would not hesitate to ask for the mediation center's assistance in complex disputes." *Id.* The mediator noted that the program was first introduced in one neighborhood, and in view of its success the local police commander asked the center to extend collaboration to other neighborhoods as well. *Id.* at 167.

<sup>189</sup> See Yulzary, *supra* note 177, at 86.

<sup>190</sup> See e.g., Levy, Rubinstein, Katby & Shani, *supra* note 187.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> See Aharon Barak, *On Mediation*, 3 *SHAREI MISHPAT* 9, 10 (2002) (Hebrew).

<sup>194</sup> *Id.* at 11.

loudness.”<sup>195</sup> Commentators suggested that polarization and disagreements in Israeli society were growing and affecting all aspects of life.<sup>196</sup> For example, in 2013 Tova Strasberg-Cohen, a former judge of the Supreme Court and the first Ombudsman of the Israeli Judiciary, noted in the Israel Bar Association's Annual Conference that “our discourse is rude, loud and self-righteous. All this enters the courts. . . . The culture of discussion in the courts reflects to a large extent the culture outside the courts.”<sup>197</sup> This atmosphere of intolerance has not subsided. According to the Hate Report of the Berl Katznelson Foundation, which monitors hate discourse in social network platforms in Hebrew, between June 2015 and May 2016, 175,000 calls to violence in the Israeli social media were registered. A third of these calls for violence were made in first person, expressing a concrete threat (such as “I’ll kill”).<sup>198</sup> The discourse was mainly in the political arena and was directed primarily against Arabs (50%) and left wing supporters (20%).<sup>199</sup> It seems, therefore, that the Israeli journey to a culture of dialogue and consent has a long way to go.

More specifically, ADR philosophy has made an attempt to facilitate a cultural change within the education system. The education system in Israel has over 2,000,000 children in nurseries and schools<sup>200</sup> with a teaching staff of about 170,000.<sup>201</sup> It is extremely difficult to assess changes of culture in such a vast organization. Programs for civility, tolerance, conflict resolution, and combating racism have been introduced and implemented in Israeli education system for over twenty years.<sup>202</sup> For example, for several years the Ministry of Education has been supporting an educational, inter-cultural mediation program in communities where immigrant students, born in Amharic- (Ethiopia), Russian-, French-, or Spanish-speaking countries study. The mediators serve as intermediaries between the education system and the immigrant families, help the immigrant students to integrate within the education system, and encourage family involvement in the educational process.<sup>203</sup>

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<sup>195</sup> See Alouph Hareven, “Do Israelis Respect Human Dignity?” Israel Democracy Institute Policy Paper No. 40 (2003), <https://en.idi.org.il/publications/8699> (Hebrew).

<sup>196</sup> See e.g., Muli Peleg, “If Words Could Kill: The Peace Process and the Failure of Public-Political Discussion in Israel,” 2 *STATE & SOCIETY* 421 (2002) (Hebrew) (discussing the intolerant discourse within Israeli society subsequent to the assassination of Israel Prime Minister Yitzhak Rabin in 1995); Mordechai Kremnitzer, “Confronting the Rabin Assassination (10.11.2014),” <https://en.idi.org.il/articles/6212> (arguing that “Israeli society has avoided a fundamental and straightforward examination of the background of this event, its meaning, and its ramifications.”).

<sup>197</sup> See Hila Raz, “Tova Strasberg-Cohen: ‘Discourse in our Country is Rude, Loud and Self-righteous. All this Enters the Courts,’” *Ha’aretz*, *The Marker*, 29.5.2013, <http://www.themarket.com/law/1.2032335> (Hebrew); see also Report of the Committee to Promote Civility and Decorum Practice in Court (2011), <http://elyon1.court.gov.il/heb/hodaa/654.pdf>.

<sup>198</sup> See The Calls for Violence Report (August 7, 2016), [http://hasata.berl.co.il/?page\\_id=464](http://hasata.berl.co.il/?page_id=464) (Hebrew).

<sup>199</sup> See *id.*

<sup>200</sup> See Facts and Data Report, The Ministry of Education, 14 (2016), [http://meyda.education.gov.il/files/MinhalCalcala/uvdot\\_venetunim2016.pdf](http://meyda.education.gov.il/files/MinhalCalcala/uvdot_venetunim2016.pdf) (Hebrew).

<sup>201</sup> See Israel Central Bureau of Statistics, [http://www.cbs.gov.il/reader/newhodaot/hodaa\\_template.html?hodaa=201706073](http://www.cbs.gov.il/reader/newhodaot/hodaa_template.html?hodaa=201706073).

<sup>202</sup> See Comptroller Special Report on Education, *supra* note 2, at 4-6.

<sup>203</sup> See, e.g., *Absorption Department for Immigrant Students*, STATE OF ISRAEL MINISTRY OF EDUCATION, PEDAGOGICAL ADMINISTRATION, <http://cms.education.gov.il/EducationCMS/Units/Olim/MeydaLarashuyot/MegashrimDovreyRsuit/KolKore.htm> (Hebrew) (last visited Jan. 2, 2019); [http://cms.education.gov.il/EducationCMS/Units/Olim/MeydaLarashuyot/MegashrimDovreyRsuit/kol\\_koree\\_megashrim.htm](http://cms.education.gov.il/EducationCMS/Units/Olim/MeydaLarashuyot/MegashrimDovreyRsuit/kol_koree_megashrim.htm) (Hebrew) (calling for a launch of such plans in 2013 and

An evaluation report of the program found it to be useful, with the students and schools highly valuing the mediators being for their work, but given the lack of random assignment of schools to the program and lack of precise data on the registration of students who receive assistance under the program, it was not possible to examine the program's effectiveness.<sup>204</sup>

It seems that what the education system lacks is not good intentions and innovative programs, but consistent and systematic implementation of them. As one mediator observed, "It is the nature of 'educational projects' that they evoke interest and attention for a while, and then are forgotten. This is also the main risk with mediation, as it is a way of life, not a temporary project."<sup>205</sup> In many schools we meet a lot of enthusiasm at first, which later dies out."<sup>206</sup>

In 2013, a committee of experts on education noted that disciplinary problems and manifestations of violence, which are part of a general and acute social problem in Israel, are also reflected in the education system. The committee referred to research that found that tens of percent of students report that they have experienced violence, were exposed to vandalism, found it difficult to learn due to interruptions in class, felt that school was not a safe place for them, and feared violence from other children.<sup>207</sup> In the next year, the Ministry of Education initiated a plan titled "The Other is Me" that seeks to promote dialogue based on universal values of acceptance, tolerance, and mutual responsibility.<sup>208</sup> According to the Ministry of Education, the plan was implemented through various national programs, and in 2015 focused on education for tolerance, combating racism, and living together.<sup>209</sup>

However, a special report of the State Comptroller and Ombudsman in 2016 on Education for a Shared Society and Prevention of Racism found non-implementation of central components in the guiding perception, lack of measurement of the phenomenon of racism, and non-implementation of the shared society programs.<sup>210</sup> The Comptroller noted that:

[t]he multi-year educational process . . . to create a model society based on universal, democratic, egalitarian, humanistic and Jewish values and with an emphasis on common denominators in Israeli society, and based on the perception that "the other is me", was not translated by the Ministry into a work plan obligating all its units . . .

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2015); *see also*

<http://cms.education.gov.il/EducationCMS/Units/Olim/MeidaVehanhayot/KoahAdam/megashrim.htm>.

<sup>204</sup> *See* "The "Mediators" Program for Ethiopian and Former Soviet Union Students: Insights from a Qualitative Evaluation" (2012) (Hebrew),

<http://cms.education.gov.il/EducationCMS/Units/Rama/HaarachatProjectim/Megashrim.htm>.

<sup>205</sup> *See* Omri Gefen, "Mediation in Israel Education System – the Challenge" (1998), <http://itu.cet.ac.il/ShowItem.aspx?ItemID=13389727-58f4-41c6-ae27-d57a4d8149aa&lang=HEB>.

<sup>206</sup> *Id.*

<sup>207</sup> *See* EDUCATING FOR A SOCIETY OF CULTURE AND KNOWLEDGE: 21ST CENTURY CHANGES AND THEIR EDUCATIONAL IMPLICATIONS 12 (Ofra Brandes & Emanuel Strauss eds., Judyth Eichenholz trans., 2013), <http://yozma.mpage.co.il/SystemFiles/23178.pdf>.

<sup>208</sup> *See* Summary Report, Ministry of Education, <http://meyda.education.gov.il/files/noar/acherani2015.pdf> (Hebrew).

<sup>209</sup> Mironi, *Mediation*, *supra* note 12, at 9.

<sup>210</sup> *See*, Comptroller Special Report on Education, *supra* note 2.

budgets and dedicated human resources were not allocated and most of the tools and methods for its implementation were not developed and even work plans for special populations were not drafted. At the level of the field, the process missed its objectives: to cope with the central rifts in society and to bring the different groups closer together. Most (approx. 60%) of the programs for assimilating the perception that “the other is me”, which schools operated, did not relate to these social rifts.<sup>211</sup>

The justice-beyond-efficiency goals of the education system have not been substantively materialized yet.

4. *Have ADR's goals of justice in the Public Sector been achieved? Has the use of ADR by the government and public bodies increased?*

An assessment of ADR's goals of justice in the public sector is extremely difficult. There is no publicly available data on the number of arbitration and mediation cases to which the state is a party or an evaluation of the use of these procedures in State disputes. The Ministries do not refer in their annual reports to the use of mediation or arbitration by their personnel. Commentators suggest that despite the Attorney-General's Directive on Mediation that has encouraged the use of ADR in disputes to which the State is a party, in practice the State still prefers to resolve its disputes in the courts.<sup>212</sup> Other public bodies do not seem to use mediation or arbitration to a considerable degree as well. For example, the Israel Police is using mediation in public complaints against police officers, however the numbers are quite low: in 2011 32 out of 1963 complaints were mediated; in 2012 68 out of 1676 complaints; and in 2013 47 out of 1547 complaints.<sup>213</sup>

More information on mediation of State disputes, though yet again, limited, can be found in the State Ombudsman Reports.<sup>214</sup> Annual Ombudsman reports and an internal evaluation paper of a pilot mediation program of the Ombudsman's office indicate that the use of mediation to investigate complaints against public bodies has been found beneficial both to the citizen-complainants and to the public authorities.<sup>215</sup> According to the Annual Reports the aim of the procedure is to “settle the dispute between the complainant and the authority through mutual

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<sup>211</sup> See *id.* at 5. The Comptroller concluded his report, stating that “[t]he administration of the Ministry of Education must lead, without delaying, the education system using messages, and from preschool through to Grade 12, in dealing comprehensively, intensely, systematically, in a mandatory and structured way with the subject of education for a shared society and prevention of racism in order to bring about change in students’ behavior patterns this area.” *Id.* at 12. In response to the Comptroller critical report the Ministry of Education responded that promoting tolerance and preventing racism have been set as one of the main objectives of the strategic plan of the Ministry for the years 2016-2019. See Yarden Skop, “The State Comptroller: The Ministry of Education Failed to Educate for Prevention of Racism,” HAARETZ, (Nov. 9, 2016), <http://www.haaretz.co.il/news/education/1.3076018>.

<sup>212</sup> See e.g., Carmit Fenton, *Why Doesn't the State Mediate?*, 4 NEKUDAT GISHUR 8, 8-9 (2002) (Hebrew); see also Mironi, *Limitations*, *supra* note 71, at 521.

<sup>213</sup> See Israel Police Annual Report for 2013, 103-04 (2013), [http://www.police.gov.il/Doc/TfasimDoc/din\\_veheshbon\\_2013.pdf](http://www.police.gov.il/Doc/TfasimDoc/din_veheshbon_2013.pdf) (Hebrew).

<sup>214</sup> See Kariv, Becker & Milo-Loker, *supra* note 103.

<sup>215</sup> See *id.*

understanding and agreement."<sup>216</sup> Some of the reports indicate that the use of mediation improved not only the efficiency of handling complaints in terms of time-duration,<sup>217</sup> but also the reciprocal relationship between participants, thereby achieving beyond-efficiency-justice goals as well.<sup>218</sup>

Despite the fact that the Ombudsman's mediation program has already been in operation for several years, a comprehensive assessment of the program has not been made yet, and there is no publicly available information about the number of mediated cases over the years, the rate of agreements, and assessment of factors beyond efficiency such as participant satisfaction, creativity of agreements, and improvement of relationships. The mediation coordinator at the Ombudsman's Office estimates that between 2010 and 2015 the Office's mediators conducted 50-80 mediations per year, and in the last couple of years the number has grown to about 100 mediations per year.<sup>219</sup> She reports satisfaction and even enthusiasm amongst public authorities that participated in mediation sessions, and an interest expressed by some of the bodies to establish their own mediation services as a means to address citizen complaints.<sup>220</sup> In her impression, formed on the basis of participants' reports, the mediations have had a positive effect beyond case dismissal in changing the culture of dialogue with citizens and raising awareness to better communication as a way of preventing future complaints.<sup>221</sup>

#### IV. THE FUTURE OF ADR AND JUSTICE IN ISRAEL

The Israeli legal system will most likely remain overloaded with cases in the near future. The litigious culture of Israeli society will probably not give way to a dialogue, consent-based culture in the next few years. Israel has much to accomplish both in terms of justice as quick and cheap resolution of legal disputes, and in terms of a richer sense of justice-beyond-efficiency, which seeks to offer a more comprehensive and complex response to conflicts between people and promote a better society.

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<sup>216</sup> See The Ombudsman of the State of Israel, Annual Report 36 (2009), General Summary, [http://www.mevaker.gov.il/he/Reports/Report\\_163/3845dfa9-b7af-4212-bd72-2451c2539112/6559.pdf](http://www.mevaker.gov.il/he/Reports/Report_163/3845dfa9-b7af-4212-bd72-2451c2539112/6559.pdf); see also The Ombudsman Annual Reports 39 and 40, Special Topics, *supra* note 103, at 117 ("The purpose of mediation is to resolve the dispute between the complainant and the body against which the complaint was made through understanding and agreement.").

<sup>217</sup> See *e.g.*, The Ombudsman Annual Report 36 (2009), *supra* note 216, at 24; The Ombudsman Annual Reports 39 and 40, Special Topics, *supra* note 103, at 117; The Ombudsman of the State of Israel, Annual Reports 37 and 38 (2011), at 75, [http://www.mevaker.gov.il/he/Reports/Report\\_124/3a3e7b94-0eb0-48d5-a335-51a392dc7613/7885.pdf#search=mediation](http://www.mevaker.gov.il/he/Reports/Report_124/3a3e7b94-0eb0-48d5-a335-51a392dc7613/7885.pdf#search=mediation) ("Experience has ... shown that mediation is often an efficient and speedy method of handling complaints.").

<sup>218</sup> See The Ombudsman Annual Reports 39 and 40, Special Topics, *supra* note 103, at 117 (noting that mediation allows the participants "to arrive at mutually satisfactory solutions which improve their reciprocal relationship"); see also The Ombudsman Annual Reports 37 and 38, *supra* note 217, at 75 ("Experience has shown that resolving disputes by way of mediation benefits the complainant and the authority and that their meeting through the mediation process results in solutions satisfactory to both parties while improving their overall relationship.").

<sup>219</sup> Anat Kariv, Mediation Coordinator at Israel State Ombudsman Office (phone conversation with the author, May 5, 2017).

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

ADR is one in an array of attempts to achieve these visions of justice that include, for example, reforms in the justice system (such as increasing the number of judges and simplifying procedural rules), the adoption of social welfare legislation (such as laws increasing minimum wage and disability pensions to empower disempowered individuals in realizing their rights), and the introduction of national programs designed to combat racism, enhance tolerance, and promote dialogue between different groups in society. As the previous Section shows, ADR in Israel today is a relatively modest force in achieving these ends of justice. There are, however, signs that ADR could become a more significant contributor to this process in the future. These promising signs are discussed next.

#### A. *Future of Arbitration*

*Arbitration* in Israel has not played a significant part in easing the burden on the courts. While the courts process about one million cases a year, the number of arbitration cases per year is estimated in several hundreds.<sup>222</sup> However, there is a place for optimism that this trend could change and arbitration becomes more significant in the attainment of ADR justice-as-efficiency goals.

First, one of the main reasons for lawyers' resistance to advising clients to include arbitration clauses in commercial contracts or agree to arbitration had been the absence of an appeal mechanism on arbitrators' awards.<sup>223</sup> The recent legislative Amendment of the Arbitration Law that allowed the use of consensual appeal mechanism on arbitrators' awards might help to change, albeit slowly, the hostile attitude of lawyers to arbitration.

Second, the high costs of arbitration, mainly due to the high fees of arbitrators who are often high-profile retired judges and elite lawyers, deter prospective users of arbitration, especially where the monetary value of the case is not very high or where the disputants are not affluent corporations or individuals, which is the majority of cases.<sup>224</sup> There are some winds of change at this front as well, with new arbitration providers professing quality arbitration services at affordable prices.<sup>225</sup>

Third, the introduction of a process of mandatory arbitration with the prospect of thousands of legal cases being routed out of court to arbitration remains a possibility. The Mandatory Arbitration Bill 2011 did not become law but there are attempts by arbitration supporters to revive this legislative initiative.<sup>226</sup> A more limited in scope, new Bill Proposal requiring mandatory arbitration in construction and road

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<sup>222</sup> See *infra* notes 150-53.

<sup>223</sup> Ben Noon & Gavrieli, *supra* note 18.

<sup>224</sup> See e.g., Chen Maanit, *2,500 Shekels an Hour*, GLOBES (Mar. 4, 2015), <http://www.globes.co.il/news/article.aspx?did=1001015311>.

<sup>225</sup> See e.g., The Arbitration Federation, founded in 2016, <http://www.borer.org.il/>.

<sup>226</sup> See e.g., Conference on Mandatory Arbitration—For and Against, Israel Bar Association (Nov. 8, 2012), [http://www.israelbar.org.il/article\\_inner.asp?pgid=138112&catid=1250](http://www.israelbar.org.il/article_inner.asp?pgid=138112&catid=1250). There are also initiatives to require mandatory arbitration in employment disputes in the public sector. See e.g., Moti Bassok, *The Director General of the Prime Minister's Office Examines: Mandatory Arbitration in Essential Services Disputes*, Haaretz, The Marker, (Mar. 30, 2013), <http://www.themarket.com/career/1.2033396> (Hebrew); Amiram Barkat, *Netanyahu Puts Pressure on Kahlon: Mandatory Arbitration Law and Reduction of Regulation*, Globes, (July 28, 2016), <http://www.globes.co.il/news/article.aspx?did=1001142098>.



accident disputes is currently under consideration in the Knesset's (Israeli Parliament) Constitution, Law and Justice Committee.<sup>227</sup>

### B. *Future of Mediation*

*Mediation* is entering a new phase in Israel. At the moment the number of cases referred by the courts to mediation is relatively small – several thousand each year, and thus the effect on the case backlog, court delays, and the quality of court services to the public is not high.<sup>228</sup> This is going to change in the next few years, with a positive effect on the realization of both justice-as-efficiency and justice-beyond-efficiency goals of ADR.

First, the Courts Administration and the Ministry of Justice consider the mandatory pre-mediation session pilot (MAHUT) which has been implemented in several civil courts in the last ten years to be a success, and plan to expand the program to *all civil courts* and to reduce the value of claims subject to mandatory mediation so as to significantly increase the number of mediated cases to tens of thousands and further the justice-as-efficiency goals of mediation.<sup>229</sup>

Second, *family disputes* have become subject to an expansive version of the mandatory pre-mediation session program as well,<sup>230</sup> and the number of mediations in these types of disputes is bound to rise. For example, according to Israel Central Bureau of Statistics, about 15,000 couples divorce every year.<sup>231</sup> Most of these couples must now first try ADR procedures before litigating their case.<sup>232</sup>

Moreover, there are thousands of cases on divorce-related issues that are filed every year for alimony, distribution of family property, custody, and visitation rights.<sup>233</sup> These cases are also subject to the ADR program and will now expose the disputants to the advantages of consent-based approaches to conflict resolution. Furthermore, the family ADR program has the potential to offer disputants much more than justice-as-efficiency through their Family Court Assistance Units (“FCAU”). As noted earlier, these units offer mediation services mainly through social workers, who tend to understand their role through a therapeutic, needs-based perspective rather than an adversarial, rights-based perspective.<sup>234</sup> As a result, the number of families who will be

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<sup>227</sup> See Courts Bill (Amendment-Mandatory Arbitration in Monetary Claims) (2016), <http://main.knesset.gov.il/Activity/Legislation/Laws/Pages/LawBill.aspx?t=lawsuggestionssearch&lawitemid=573090> (proposing mandatory arbitration in claims for damages to property due to defects in construction and due to road accidents).

<sup>228</sup> Levy, *supra* note 148.

<sup>229</sup> Barak Laser, Legal Adviser to the Courts Administration, lecture on “The Institutionalization of Mediation, A Systemic Look” in a Conference titled “Between Mediation and Law – Institutionalization, Authority, and Innovation” (Bar-Ilan University, Feb. 1, 2017).

<sup>230</sup> See Temporary Provision for Settlement of Litigation in Family Disputes Regulations (2014); Temporary Provision for Settlement of Litigation in Family Disputes Regulations (2016).

<sup>231</sup> See divorce statistics in Israel Central Bureau of Statistics, [http://www.cbs.gov.il/shnaton67/st03\\_01.pdf](http://www.cbs.gov.il/shnaton67/st03_01.pdf).

<sup>232</sup> Settlement of Litigation in Family Disputes Law (Temporary Provision), § 3 (2014).

<sup>233</sup> For example, in the Rabbinical Courts, 11,114 Jewish couples divorced in 2015. See the Rabbinical Courts Annual Report for 2015 (2015), <http://www.rbc.gov.il/Publications/Statistics/Pages/default.aspx>. At that year the number of new cases filed with the Courts was over 93,000, including 7,536 claims for divorce, 3,400 claims for alimony, 2049 claims for distribution of property, and 2711 claims for custody. See *id.*

<sup>234</sup> See Inbar et al., *supra* note 170, at 31-33.

exposed to needs-based ADR is likely to rise. In addition, the new legislation requires the FCAU workers to inform disputing families of consensual ADR methods that could assist them in resolving their dispute and refer them, if they wish to try mediation, to a list of private mediators approved by the Court.<sup>235</sup> This can boost the number of families who solve their problems out of court with all the benefits associated with mediation. On the other hand, if these mediators adopt an evaluative-mediation paradigm, the full potential of mediation, which is associated with a richer sense of justice, will not be realized.

There are also positive signs of greater appreciation of the benefits of mediation and willingness to use it without resorting to court. For example, the Ministry of Social Affairs and Social Services supports the expansion of mediation services to the public through Citizen Advisory Units<sup>236</sup> and community mediation centers.<sup>237</sup> Furthermore, the Ombudsman Office indicated in a recent Annual Report that one of the objectives of the office in investigating complaints is improving citizen services by streamlining procedures and reducing the time required for handling complaints through increased use of mediation procedures.<sup>238</sup> Moreover, more complaints will be outsourced to external mediators in order to increase the number of mediated complaints,<sup>239</sup> thereby increasing the potential of mediation to reach efficiency and beyond-efficiency justice goals.

### C. *Expansion of ADR Processes*

There are some signs that the Israeli justice system is in a process of expanding the range of ADR methods offered to the public. First, the new legislation on family conflicts officially named for the first time collaborative divorce as a legitimate method of ADR that families in crisis should consider employing in solving their dispute.<sup>240</sup> Moreover, FCAU workers may now recommend that families resolve their disputes through collaborative divorce alongside the more established ADR method of mediation. Collaborative divorce is a non-adversarial, interest-based process.<sup>241</sup> It often involves neutral experts who work together with the parties and their lawyers to achieve a solution tailored to the parties' and their children's needs, and the process has the potential to promote justice-beyond-efficiency goals.<sup>242</sup>

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<sup>235</sup> See Temporary Provision for Settlement of Litigation in Family Disputes Regulations, § 7 (2016) ("At the end of the last MAHUT meeting ... the Assistance Unit will recommend to the parties the appropriate procedure in its opinion to settle the dispute between them, including by way of counseling, mediation, collaborative divorce, and family or couple treatment...").

<sup>236</sup> See, e.g., MINISTRY OF LABOR, SOC. AFFAIRS & SOC. SERVS., ANNUAL REPORT FOR 2012, 82 (2012) ("There is a need for mediation services [within 'Shil' units] and an expansion of these services are planned in the future"). However, the Annual Reports do not provide specific information on the number of units that offer mediation services and the number of mediation sessions that were conducted.

<sup>237</sup> See Gishurim Program, *supra* note 49.

<sup>238</sup> See STATE COMPTROLLER AND OMBUDSMAN OF THE STATE OF ISRAEL, ANNUAL REPORT FOR 2015, 23 (2015).

<sup>239</sup> The Ombudsman Annual Reports 39 and 40, *supra* note 103, at 117-18.

<sup>240</sup> See Temporary Provision for Settlement of Litigation in Family Disputes Regulations, § 7 (2016).

<sup>241</sup> *Collaborative Divorce*, MILLS & REEVE (2018), <https://www.divorce.co.uk/divorce-approaches/collaborative-divorce>.

<sup>242</sup> *Id.*

Second, the new Civil Procedure Regulations give negotiation and mediation a greater place in the litigation process.<sup>243</sup> According to the new regulations, which will come into force in September 2019, pre-litigation protocols will require litigants to go through both direct negotiation and mediation phases soon after the submission of claims and before trial begins.<sup>244</sup> If accepted, the proposal would encourage hundreds of thousands of litigants to engage in negotiation and mediation before trial in the hope that the dispute is resolved out of court, and if the dispute remains unresolved, simplify and hasten the trial stage.<sup>245</sup> Again, the introduction of these ADR mechanisms into the courts comes with risks. One commentator who analyzed the proposal expressed concern that the pre-trial negotiation and mediation phases would most likely be adversarial, rights-based, and evaluative in nature.<sup>246</sup> In terms of justice, the negotiation and mediation phases will most likely be dominated by lawyers, legal jargon, and formal-legal solutions (i.e., by justice-as-efficiency ideology), at the expense of parties' participation and voice, attention to parties' needs and interests, and creative, extra judicial solutions.<sup>247</sup> In addition, disempowered people might find the introduction of a new pre-action phase cumbersome, bureaucratic, and expensive, curtailing their access to justice.<sup>248</sup>

Third, there have been calls to add Early Neutral Evaluation (“ENE”) and Mediation-Arbitration (“Med-Arb”) to the ADR mechanisms available to disputants. At the moment, the use of ENE in Israel is very rare.<sup>249</sup> With a view to changing this reality, one commentator suggested that ENE should become a pre-trial requirement in civil actions as opposed to simply an additional ADR mechanism which is offered to disputants.<sup>250</sup> In addition, she suggested that the legislature should give Med-Arb a legal basis in the Arbitration Law in order to raise awareness for this process.<sup>251</sup> Another commentator suggested that Med-Arb and ENE should be introduced to the current legislation on mediation as additional ADR means.<sup>252</sup> The proposal seeks to allow the courts to refer cases to private ENE and Med-Arb processes conducted by court-approved experts, mediators, and arbitrators.<sup>253</sup> This proposal is currently under review in the Ministry of Justice and, if accepted, is likely to further enhance the justice-as-efficiency vision of ADR in Israel. Online Dispute Resolution (ODR) is another ADR-related mechanism that is making its

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<sup>243</sup> See Israel Civil Procedure Regulations, §§ 34-39 (2018) (Hebrew).

<sup>244</sup> Civil Procedure Regulations §§ 34-37 (Hebrew).

<sup>245</sup> See Civil Procedure Regulations §§ 34-37, Draft Regulations § 6.

<sup>246</sup> See Rabinovich-Einy, *supra* note 41, at 48-49.

<sup>247</sup> *Id.* at 34-35.

<sup>248</sup> *Id.* at 35.

<sup>249</sup> See Lavi, *supra* note 25, at 429-30.

<sup>250</sup> See *id.* at 417, 434-35.

<sup>251</sup> See Dafna Lavi, *Not Only Arbitration and Not Only Mediation—A Proposal to Adopt “Med-Arb as a Response to the Weaknesses of the Institution of Arbitration in Israel,”* 42 MISHPATIM: THE HEBREW UNIVERSITY LAW REVIEW 589, 590 (2012) (Hebrew).

<sup>252</sup> Proposed Amendment to the Courts Regulations (Mediation) (1993) (file attached to e-mail from Dr. Peretz Segal, Former Head of the Nat’l Ctr. for Mediation & Disp. Resol. in the Ministry of Just., (Mar. 25, 2017) (on file with the author).

<sup>253</sup> *Id.*

very first steps in Israel<sup>254</sup> and has the potential of expanding access to justice.<sup>255</sup>

#### D. *Introduction of ADR into New Areas*

There is a continuing exploration of new areas for the application of ADR mechanisms in Israel that could increase the social significance of ADR in the future. For example, one scholar has recently suggested that ADR could empower consumers vis-à-vis businesses and improve the protection of consumers' rights.<sup>256</sup> He argues that businesses have better access to financial, legal, and informational resources, and that this state of affairs results in low rates of consumer litigation in the courts and under-enforcement of consumers' rights.<sup>257</sup> He goes on to propose that ADR methods such as mediation, med-arb, and ODR be used to increase the number of consumers who have a redress to their problems without resorting to litigation and help the courts provide better solutions where consumer litigation is initiated.<sup>258</sup> Such initiatives have both justice-as-efficiency implications (for example, a swifter and cheaper method for processing legal claims) and justice-beyond-efficiency advantages (for example, reaching larger numbers of injured parties and providing them with information, accessible means for redress, and creative solutions).

#### E. *Greater Influence of ADR Perspective on Judiciary*

ADR philosophy and worldview are changing the traditional role of judges in Israel. In view of the enormous burden of cases, Israeli judges are more willing not only to refer cases to ADR but also to encourage settlements themselves and even engage in judicial mediation.<sup>259</sup> Some commentators suggest that this trend will see an increase in the future.<sup>260</sup> They encourage judges to adopt the culture of mediation in performing

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<sup>254</sup> See, e.g., Orna Rabinovich-Einy, *Reflecting on ODR: The Israeli Example* (May 14, 2014) (unpublished conference paper), [https://www.researchgate.net/publication/221172969\\_Reflecting\\_on\\_ODR\\_The\\_Israeli\\_Example](https://www.researchgate.net/publication/221172969_Reflecting_on_ODR_The_Israeli_Example).

<sup>255</sup> See, e.g., Idan Yehuda, *Alternative Dispute Resolution for Consumer Disputes*, 21 *HAMISHPAT* 247, 262, 271 (2015) (Hebrew).

<sup>256</sup> *Id.* at 262, 271.

<sup>257</sup> *Id.* at 248-49. Even when the court system is approached, it is unable to offer satisfactory solutions to disputants. For example, small claims courts, that deal with many consumers' claims, do poorly because the qualifications and expertise of small claims court judges vary and the rules of evidence do not apply. In addition, mass-claims that are often used in consumer cases, produce high proportion of low-quality settlements. *Id.* at 252-53.

<sup>258</sup> *Id.* at 267-276.

<sup>259</sup> The court may suggest a settlement to the parties. Courts Law (Consolidated Version), *supra* note 105. The judge is authorized to inquire whether there is a room for settlement between the parties. Civil Procedure Regulations § 140 (Hebrew). The Ombudsman of the Israeli Judiciary stressed in his Opinions the importance that settlements facilitated by judges are agreed upon freely by the parties on the basis of informed consent. Opinion 8/04, <http://www.justice.gov.il/Units/NezivutShoftim/MainDocs/804.pdf>. However, according to the Ombudsman, judges should not conduct mediations as opposed to facilitation of settlements. Opinion 187/14 "Mediation before a Family Court Judge," <http://www.justice.gov.il/Units/NezivutShoftim/MainDocs/Decisions1.pdf>.

<sup>260</sup> Sarah Frisch, *Use of Mediation Principles in the Judicial Process*, 3 *SHAAREI MISHPAT* 37, 42-45 (2002); Karni Perlman, *Mediator Judge? On Judicial Settlement and Between Reality and Desirable in Israeli Law*, 19 *L. & BUS.* 365, 413-414 (2015) (Hebrew).

their judicial role<sup>261</sup> and suggest that judicial involvement in conflict resolution receives legal footing.<sup>262</sup>

Adapting the role of judges and courts to the jurisprudence and principles of ADR<sup>263</sup> could yield benefits to both individuals and society, such as improvement of the psychological welfare of disputants; simplification of formalities and tailoring procedures and outcomes to disputants' needs; and democratization of legal processes through encouragement of active participation of disputants, giving participants greater voice and say.<sup>264</sup> These are all measures of justice in its wider sense beyond efficiency. If ADR philosophy is successful in increasing its hold on judges, court administrators, and lawyers in the next years, the impact on ADR's goals of justice in Israel will grow as well.

#### F. *Expansion of Community Mediation Programs*

Community Mediation and Dialogue Centers are taking a greater and sometimes leading role in promoting ADR culture in Israel and achieving ADR's justice goals. Community mediation, which is based primarily on volunteers' work, is a genuine expression of ADR's wider vision of justice, and it continues to evolve and grow notwithstanding the scarcity of financial resources. This trend increases the spread of consent-based ideology within Israeli society. Moreover, community initiatives could pave the way to national programs. For example, Israel lacks a general and effective code of ethics for mediators and a national or court-connected mediators' ethics committee capable of issuing ethical guidelines to mediators.<sup>265</sup> A local initiative of one Community Mediation and Dialogue Center resulted in 2014 in a code of ethics for the center's mediators and in an ethical forum that receives ethical questions from mediators across the country and delivers ethical opinions in response.<sup>266</sup> The enterprise attracted the attention of various bodies that wished to take it further. For example, the Israeli National Community Mediation Association, which represents all Community Mediation and Dialogue Centers in Israel, together with Gishurim Program, which is a national program to help Community Mediation Centers in Israel operated under the leadership of the Community Work Service at the Ministry of Social Affairs and Social Services, have recently adopted a national mediators' code of ethics based on the 2014 code and applicable to all community mediators and have planned the establishment of a national mediators' ethical forum.<sup>267</sup> Another national mediator organization, the

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<sup>261</sup> See, e.g., Frisch, *supra* note 260, at 42-45; Perlman, *supra* note 260, at 365, 413-14.

<sup>262</sup> See, e.g., Perlman, *supra* note 260, at 411-12.

<sup>263</sup> On the jurisprudence and common principles of ADR see Michal Alberstein, *The Mediation Revolution in Israel: Current Mapping of Intersections of Conflict Resolution and Law* (unpublished paper) (May 4, 2015), <https://ssrn.com/abstract=2602184>, and Michal Alberstein, *Judicial Conflict Resolution (JCR): A New Jurisprudence for an Emerging Judicial Practice*, 16 CARDOZO L. J. OF CONFLICT RESOL. 879, 887-92 (2015).

<sup>264</sup> See, e.g., Karni Perlman, *The Therapeutic Judge—A New Role in Court and Its Relationship to the Ideas of the Legal Realism School*, 26 BAR-ILAN L. STUD. 415 (2010) (Hebrew); Perlman, *supra* note 260, at 366-68.

<sup>265</sup> See *supra* Section II.E.2.

<sup>266</sup> See *Mediation Ethics: Codes of Ethics and Dilemmas* (Omer Shapira and Carmela Zilberstein eds., 2018); SHAPIRA, *MEDIATORS' ETHICS*, *supra* note 6, at 365-72, 390-94 (discussing ethics opinions of Kiryat-Ono Community Mediation Center Ethics Forum).

<sup>267</sup> E-mails from the Gishurim Program and the Managing Body of the Israeli Community Mediation Ass'n to author (Mar. and Apr. 2017) (on file with author).

Israeli Chamber of Mediators, which is an association of private mediators, has also adopted a version of the 2014 code for its members.<sup>268</sup> These initiatives could enhance the realization of ADR goals of justice-beyond-efficiency in promoting ethical practice of ADR, raising awareness of ADR users as to what can be legitimately expected of ADR providers, increasing public confidence in ADR processes and professionals, and fostering dialogue and consent-based mechanisms for conflict resolution over litigation or violence.

## V. CONCLUSION

ADR is a young movement in Israel, though the practice of conflict resolution and mediation has biblical sources and is a well-known part of Jewish heritage.<sup>269</sup> Three decades of modern ADR activities have proved fruitful though modest in outcomes. Today, ADR is very much connected in the mind of policy makers, professionals, and the public with the goals of justice: justice in its *narrow* sense of achieving a more efficient, affordable, and time-saving legal system, and practical, consensual conflict resolution; and justice in its *wider* sense of achieving a more humane, emphatic, needs-responsive, respectful, and empowering legal system and mechanisms for conflict prevention and resolution, operating in a culture of tolerance, respect, and dialogue.

These ambitious visions of justice have not yet materialized in Israel. The article described some of the efforts taken on this road and noted their limited contribution to the state of justice in Israeli society at the current time but pointed to new developments in the ADR field in Israel and in ADR's positive reception by Israeli society that leave room for optimism for the future.

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<sup>268</sup> See *Code of Ethics*, ISRAELI CHAMBER OF MEDIATORS, <https://ic-m.org.il>.

<sup>269</sup> See, e.g., Gerald M. Steinberg, *Conflict Prevention and Mediation in the Jewish Tradition*,

12 JEWISH POL. STUD. REV. 3, 4 (2000), <http://jcpa.org/wp-content/uploads/2000/10/conflict-prevention.pdf>.



