

SIDE JUDGES: THE CASE OF THE ISRAELI MILITARY COURTS

Dr. Michal Tamir* and Judge Amir Dahan**

This study aims to evaluate the changes in the independence and quality of the judicial process, in relation to judicial panels dealing with serious crimes in the military courts of Judea and Samaria (hereinafter, “the Region”). This evaluation follows the 2002 transition from judicial panels, consisting of a legally trained judge (the presiding judge) accompanied by two officers without a legal education, to expert panels consisting of three judges, all of whom are jurists.

The rationale for integrating side judges into the legal system is their close relationship with the target community and an increased public confidence in the system. At the same time, this system has many disadvantages, such as the capacity of a non-expert judge to examine issues of substantive criminal law, criminal procedure and evidence, the fear of over-reliance on the expert judge and the inability to neutralize identification with a particular legal system. These disadvantages become particularly pertinent in relation to criminal adjudication in the Region, where the closeness of Israel Defense Forces officers to the target community is open to question, as is the contribution made by their presence to public confidence in the system.

The study is an empirical-quantitative one and examines a random continuous sample of cases heard by a joint expert and non-expert panel and a sample of cases heard by an expert panel. Among the values considered are: type of offence; duration of the case; type and degree of punishment; and the relationship between the indictment and the verdict. The findings indicate that the transition to a panel of experts has led to a higher rate of amendments made to indictments, a higher rate of acquittals, a greater volume of legal and factual references as well as more detailed reasoning in the judgments and verdicts, a rise in the level of reliance on legal sources, and a greater number of dissenting opinions in the judgments.

* Dr. Assistant Professor (Senior Lecturer), Sha’arei Mishpat School of Law.

** Judge of the Military Court in Judea; academic qualifications in Mathematics and Law. The paper was presented in Israeli Law and Society Association International Conference, Tel-Aviv University, December 2009. The author wants to thank the member of the panel “Current Challenges to the Legal Profession and the Judiciary.”

I. INTRODUCTION	3
II. ADJUDICATION BY NON-EXPERTS	5
1. Adjudication in the Army (Military Tribunals)	7
2. Adjudication in the Region (Military Courts)	8
III. REVIEW OF THE CHANGES IN LEGISLATION AFFECTING THE REGION	11
1. Manner of Selecting and Ending Judges' Office.....	13
2. Qualifications of Judges to Hold Office	16
3. Judicial Independence.....	17
4. The Power of Non-Judicial Bodies to Change Judgments.....	19
IV. THE TRANSITION FROM PANELS INCLUDING NON-EXPERTS TO PROFESSIONAL PANELS.....	21
V. METHODOLOGY.....	23
1. Method of Sampling.....	24
2. The Quantitative Values	25
VI. RESULTS AND CONCLUSIONS	27
1. The nature of the primary offence in the indictment	27
2. The lifespan of the file (in days)	27
3. The relationship between the indictment and the verdict.....	28
4. The manner of conducting the trial	29
5. The acquiescence of the side-judges with the presiding judge regarding the verdict	30
6. The extent of reasoning in the verdict	30
7. The number of references to legal materials in the verdict.....	31
8. Agreement as to sentence	32
9. The extent of reasoning in the sentence	33
10. The number of references to legal materials in the sentence.....	33
11. Acquiescence by the side-judges with the presiding judge regarding sentence	34
VII. SUMMARY	34

I. INTRODUCTION

Are judicial deeds made by panels composed of lay and expert judges significantly different from those made by panels composed exclusively of expert judges? This paper examines the above question with regard to the military courts of Judea, Samaria and Gaza (“the Region”¹). These courts deal with trials that have a legal linkage to the Region, as against military tribunals which deal with criminal offences committed by soldiers. The military courts deal with all types of cases. However, this paper examines only serious crimes in light of the significant changes that have taken place over the years in the judicial panels dealing with serious offences in the military courts operating in the Region.

Until 2002, adjudication in the Region was carried out by panels that consisted of a single legally qualified judge, the *mishpetai*, a “jurist”,² who sat as the presiding judge, and two additional judges – officers on “active service”³ in the Israel Defense Forces (hereinafter, “the IDF”) – who possessed no legal training and had no connection to the routine judicial work carried out by any court. Panels consisting of three judges possessing a legal education and legal experience were first

1 As is well-known, the territories of Judea, Samaria and the Gaza Strip, which fell within and which, in part, still fall within the official classification of “belligerent occupation”, are called different names, such as “Yesha”, “Yosh” and “Ahza” – Hebrew acronyms accepted in the IDF – or the “Occupied Territories”, the “Administered Territories”, the “Territories”, and “Judea and Samaria” – names commonly used by the general public. We prefer the name used in legislation. *See, e.g.*, Entry into Israel Law, 5712-1952, SH No. 111, § 12A. “The Region” includes all the territory that remained under the control of the IDF following the ceasefire agreements and which has not since been transferred by legislation or agreement into the control of the State of Israel or any other authority. Over the years, the jurisdiction of the military courts has been confined to particular issues and sectors within the Region. Likewise, jurisdiction has been excluded in respect of the Sinai Peninsula, certain issues that were transferred to the Palestinian Authority under the interim agreements, and the Gaza Strip after 1995. The Gaza Strip is no longer under belligerent occupation since the August 2006 unilateral Israeli detachment. Hence, the authorized legal instance regarding the people of the Gaza Strip is no longer military.

2 The term “*mishpetai*” – jurist judge – is defined in the Order Concerning Security Provisions (No. 378), 5730 – 1970 (hereinafter, “Order No. 378”) and refers to a judge possessing legal education and experience, in contrast to a non-expert judge. *See also*, Military Justice Law, 5715-1955, SH No. 189, § 185.

3 The IDF is composed of “active service persons”, whose service is their daily job, and “reserve duty persons”, who are called to duty occasionally.

established in 2002, and were entrenched in legislation in 2004.⁴ In other words, for 35 years, the legal system in the Region enabled serious criminal offences to be heard by panels consisting of two non-experts and one judge who possessed legal qualifications and presided over the panel. This was the norm, despite the requirement that judges appointed in Israel possess basic qualifications, namely an academic legal education and legal experience of a nature that was precisely defined for each of the various positions.⁵

The change that occurred at the beginning of the 21st century led to all judges being required to satisfy basic conditions relating, for example, to age and legal qualifications. This important change may have been a watershed moment in the performance of the Serious Crimes Judicial Panels in the Region, the ramifications of which underlie the current empirical study.

The study is an empirical-quantitative one and examines a random continuous sample of cases heard by a joint expert and non-expert panel and a sample of cases heard by an expert panel. The very essence of the research is the examination of qualitative text using quantitative figures. Hence, in order to follow systematic trends, we considered such data as the type of offence, the duration of the case, the type and degree of punishment and the relationship between the indictment and the verdict. Having said that, we must admit that there is no way to detect the real process that took place in the judges' chambers and in the depths of the souls of the judges. Naturally, statistics dealing with judgment patterns cannot give a detailed account of all the aspects regarding the work of the judge. However, statistics can tell a story, and an interesting one at that.⁶ In that context, we feel that the story our findings tell might be interesting.

4 Order Concerning Security Provisions (No. 1550), 5744 – 2004. This amendment also stated that the selection of judges would be carried out by a selection committee and not by the Military Attorney General, as had previously been the legal situation.

5 Courts Law [Consolidated Version], 5744-1984, SH No. 1123 (hereinafter, “the Courts Act”); Military Justice Law, 5715-1955, SH No. 189 (hereinafter, “the Military Justice Act”); Labor Tribunal Law, 5729-1969, SH No. 533, § 3 (hereinafter, “the Labour Tribunal Act”).

6 Eli M. Salzberger, *Temporary Appointments in the Supreme Court of Israel and Judicial Independence: Theoretical Analysis and Some Empirical Findings*, 19 MECHIKAREI MISHPAT 541, 542 (2003).

The study is presented in six parts. The *first section* will deal with the system in which non-experts were included in judicial panels, the rationale underlying this system, criticisms of it and the reasons which led to its use in criminal trials in the Region. The *second section* will review the legislative history of the legislation that creates the procedure for selecting judges in the Region, their qualification terms, appointment and independence. The *third section* will discuss the transition from panels which included non-experts, to all jurist panels. The *fourth section* will present the methodology of the study. This is a quantitative study that compares two groups: the first being a collation of judgments delivered by mixed panels (non-experts with an expert judge) and the second, judgments delivered by all jurist panels. The *fifth section* will present the results of the study. The *sixth section* will sum up the conclusions suggested by the study.

The results indicate that the transition to a panel of experts has led to a higher rate of amendments made to indictments, a higher rate of acquittals, a greater volume of legal and factual references as well as more detailed reasoning in the judgments and verdicts, a rise in the level of reliance on legal sources, and a greater number of dissenting opinions in the judgments. A particularly interesting conclusion relates to changes in the mode of writing of the presiding judge himself, who tends to provide a broader rationale for his position when he is sitting together with two other jurists. These findings shed a different light on the legitimacy of the inclusion of lay judges in the judicial process in general, and particularly when they do not satisfy the conditions of being “peers”.

II. ADJUDICATION BY NON-EXPERTS

The arrangement of jurists sitting with judges who do not possess legal expertise can be found in various judicial structures in Israel and around the world. Thus, for example, the Labour Tribunals routinely include “public representatives” on the bench; these are representatives of workers and employers of organizations, who may or may not be jurists.⁷ Water Tribunals include public representatives selected by the Minister of National Infrastructure.⁸ It is even possible to appoint a

⁷ Labour Tribunal Act, § 10.

⁸ Water Law, 5719-1959, SH No. 288, p. 169, § 141.

person who does not possess a legal education or legal experience to the Supreme Court of Israel; such a person is known as an “eminent jurist”.⁹ An interesting example is the ancient institution of trial by jury, which was regarded as a barrier to the caprices of a king-appointed judge, and accordingly was entrenched in the Magna Carta as the basic right of every free man.¹⁰ This legal method survives to this day in a number of Common Law countries, which use a jury for the determination of facts.¹¹

There are a number of rationales for placing persons who lack a legal education in judicial positions:

- People lacking judicial expertise may possess, by virtue of their personality or background, other expertise for which there is no substitute and which may improve the judicial process.¹²
- The task of the people lacking legal expertise is usually confined solely to the determination of truth- a task that does not require legal expertise, but rather, familiarity with the public, the language, customs and code of conduct of the witnesses and parties.¹³

9 Courts Act, § 2(3). The first and last judge selected under this section was the late Rabbi Prof. Simcha Assaf, who was a Professor of Talmud in the Hebrew University but not a jurist.

10 See MAGNA CARTA, § 39:

No freeman shall be taken captive or imprisoned, or deprived of his lands, or outlawed, or exiled, or in any way destroyed, nor will we go with force against him nor send forces against him, except by the lawful judgment of his peers or by the law of the land.

11 See, e.g., U.S. CONST. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

12 See, e.g., Water Bill, 5718 – 1957, SH No. 326, p. 76 (Explanatory Notes for Chapter 6, Part B).

13 Thus, for example, among the reasons for establishing the Labour Tribunal was the fact that the general legal system was not prepared to handle the special problems of labour law, which ought also to be examined in accordance with criteria taken from the sociology of labour and labour economics, and not only legal criteria. See RUTH BEN-ISRAEL, LABOR LAWS IN ISRAEL 31 (1989).

- Large organizations sometimes wish to use the process of adjudication to introduce factors relating to the proper functioning of the organization, by means of the non-expert judges who are coming from “the field”.¹⁴
- Trial by one’s peers increases public confidence in the judicial system.¹⁵

Conversely, there are those who argue that non-experts should not be given the task of deciding matters of substantive law and laws of evidence, as such determinations are complex and require extensive study and experience.¹⁶ Another criticism warns against the phenomenon of over-reliance on the jurist judge and excessive self-effacement on the part of the non-expert judges.¹⁷ It has also been argued that a non-expert judge is incapable of internalizing and maintaining his judicial independence, and may make judicial decisions that are impacted by his identification with personal or organizational issues.¹⁸ Occasionally, criminal cases give rise to serious questions which require the collective thinking of a number of jurists; this applies *a fortiori* in appeal courts, which must review the legal correctness of the lower court judgment.

1. Adjudication in the Army (Military Tribunals)

In Israel, the military tribunals that try soldiers, both at first instance and in the appeal court, include judges who are not jurists.¹⁹ Apparently, the primary

14 See, e.g., the comments of the first Military Attorney General, the late Lieutenant Colonel Aharon Hoter-Ishai, to a joint session of the Constitution, Law and Justice Committee and the Foreign Affairs and Defence Committee of the Knesset, on the eve of the enactment of the Military Justice Act:

‘With regard to the army, judging is not performed by professional judges but primarily by commanders or officers. The reason for this is that adjudication within the army is part of the disciplinary effort designed to preserve the army. Judging at the disciplinary stage is within the province of commanding officers, and at a later stage within the province of officers knowledgeable in the law...this is one of the reasons why it is possible to re-examine a judgment within the military legal system.’

Quoted in ODED MUDRIK, *MILITARY JUDGING* 189 n.35 (1993).

- 15 In the British military court, for example, a non-officer soldier must be tried by a panel that includes regular soldiers and not only officers. See MUDRIK, *supra* note 14, at 117, n.152 and the references cited therein.
- 16 See, e.g., Ilan Bombach & Yariv Ronen, *Side Judges in the Shadow of the Influence of the Presiding Judge: A Critical Review*, 16 *LAW AND ARMY* 110 (2002).
- 17 MUDRIK, *supra* note 14, at 116.
- 18 See *U.S. v. Carver*, 6 U.S.C.M.A. 258, 19 C.M.R. 384 (1955).
- 19 See the Military Justice Act, §§ 202, and 213.

reason for the continuation of a system in which non-experts try soldiers in the army is the clear-cut interest in integrating considerations of discipline, hierarchy and preservation of the consolidation of the army within the judicial process, as well as promoting the material and moral values of those actively engaged in army duties, fighting and command.²⁰

In our opinion, it is highly doubtful whether these factors should be taken into account when determining the composition of judicial panels. Even if these considerations are relevant in certain situations, they should be taken into account only after seriously weighing the advantages and disadvantages of the legal arrangement. As this is a primary arrangement, it must be established by statute, which will then also determine the appropriate system of checks and balances needed to deal with the above mentioned disadvantages.

The statutory arrangement relating to the trial of soldiers in the IDF contains a partial system of checks and balances. It is achieved, *inter alia*, by making the professional judges a majority in the Military Court of Appeals,²¹ making it also mandatory for non-professional judges to express an opinion (the Presiding Judge expresses his opinion last in order to not influence his colleagues),²² and providing a right of appeal to the Supreme Court.²³ It may still be argued that these are inadequate balances, since factual findings are reached by lay judges, without proper scrutiny on appeal.²⁴

2. Adjudication in the Region (Military Courts)

Upon the establishment of the military courts in the Region after the 1967 war, the legislation relating to the Region delineated their composition.²⁵ According to these provisions: "Every military court shall be convened by a court president

20 Cf. MUDRIK, *supra* note 14, at 118.

21 Military Justice Act, § 213.

22 Military Justice Act, § 390.

23 Military Justice Act, § 440I.

24 As is well known, the Court of Appeals does not ordinarily intervene in factual findings. See, e.g., CrimA 398/89 Manzur v. State of Israel [1994]; CrimA 1160/09 Azulai v. State of Israel [2009]; decisions unpublished.

25 Order Concerning Security Provisions (Judea and Samaria) 5727 – 1967 (hereinafter, the "1967 Order"), § 6.

[the presiding judge], who is an officer in the Israeli Defence Forces, holding the rank of major or a higher rank, and two officers of any rank.... The appointed court president shall have legal qualifications”. In other words, the panel was to be composed of a judge with legal qualifications (who would preside over the court and be called the “president” of the court) and two judges who would be brought in for this purpose from among the regular army officers of the IDF, and who did not necessarily possess legal qualifications. This type of panel continued to operate until 2002.

From the language of the legislation,²⁶ one can learn that the composition of the court was inspired by the military tribunals that tried IDF soldiers. Likewise, as the legislation referred, and even gave priority, to the provisions of the Fourth Geneva Convention (hereinafter, “the Convention”),²⁷ it is conceivable that the court’s composition was also influenced by the provisions of Article 66 of the Convention, according to which protected persons must be tried by a military non-state court.²⁸ The rationale underlying this provision is that an army is perceived to be a non-political entity and thus, it was designed to ensure non-political trials.²⁹

The *de facto* situation was that whereas IDF soldiers who served in the Region were tried in military tribunals in accordance with the Military Justice Act, and

26 See, the 1967 Order, § 10: “Regarding the laws of evidence and rules of procedure, the military courts will act in accordance with the rules applied in the military tribunals which try soldiers.” It should be noted that with regard to the evidence, since 1992, the reference is to the Israeli Evidence legislation and not to the military tribunals. See Order Concerning Security Provisions (Amendment No. 69) (Judea and Samaria) (No. 1392), § 9.

27 See, the 1967 Order, §35:

A military court and the administration of a military court shall comply with the provisions of the Geneva Convention of 12th August 1949 relative to the Protection of Civilian Persons in Time of War in so far as concerns legal proceedings and in the event of a contradiction between this Order and the said Convention, the provisions of the Convention shall take precedence.

It should be emphasized that this section was deleted in 1970, in Order No. 378.

28 See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T 3516, 75 U.N.T.S. 287 (ratified by Israel on July 6, 1951).

29 Zvi Lekach, *Judging Palestinians versus Judging Soldiers: How a Structural-Organizational Difference May Lead to Discrimination and Prejudice the Rights of the Accused*, COLLECTION OF DISTINGUISHED ARTICLES 13 (1996) (Library of the Command and Staff College) (copy on file with the authors). See also 4 COMMENTARY: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 339-340 (Jean S. Pictet ed., 1958).

border policemen who committed offences in the Region were tried in civilian courts, protected persons in the Region were put on trial before military courts. In other words, although Israeli soldiers, regarded as the soldiers of the “occupying power”, were tried by independent courts, the protected (Arab) civilians were tried by a panel that included members of the Military Attorney General’s Unit, a unit that also appointed the prosecutors. This situation created an inherent conflict of interests.

As we shall show,³⁰ in our opinion, the integration of non-experts in the trial process in the Region carried all the disadvantages inherent in such a process, as well as additional disadvantages ensuing from the unique aspects of the situation in the Region; conversely, it offered no advantages whatsoever. Random army officers, however exalted their rank, did not possess special expertise that could improve the process of trying people who were not soldiers; they had no advantage in terms of determining the truth, and they were certainly not more familiar with the public, the language, the customs or the code of conduct of the witnesses or parties appearing before them. That is to say, no rationale of “trial by peers” is met here, since the judges and the affected population belong to two groups that will never integrate, nor is there any transitive relation between them.³¹ Moreover, where the persons involved were local residents, the rationale asserting that integrating military figures would improve military discipline did not apply. Additionally, as these officers belonged to the executive authority, it could not be said that integrating them into the system would increase public confidence in the judicial process.

One of the rationales used to justify integrating non-expert judges in the trial process is the fact that their legal decisions can be scrutinized by an appeal court. However, even the appeal court, established in the Region in 1989, included judges with no legal qualifications.³² This structure was set up without a mechanism of checks and balances, similar to the one prevailing in the military tribunals.³³

30 *See infra* Section V.

31 As opposed to, for example, employers and employees in the Labour Tribunal, military officers and the defendants in the Military Tribunals, who could potentially be judges and defendants as well.

32 Order Concerning Security Provisions (Judea and Samaria) (No. 1265) 5749 – 1989 (hereinafter, “Order No. 1265”), § 4B.

33 *Supra* notes 19-23.

During the period in which this system operated, the military courts in the Region came under extreme pressure of work. The routine agenda of the courts included the trial of such serious crimes as murder and attempted murder, in numbers that even exceeded those tried by the civilian courts in Israel.³⁴

III. REVIEW OF THE CHANGES IN LEGISLATION AFFECTING THE REGION

This review focuses on changes that took place in legislation affecting the Region between the years 1967–2006, in relation to a variety of examined parameters. The examination referred to the following legislations:

1. Order Concerning Security Provisions (Judea and Samaria) 5727 – 1967 (the order that first established the military courts): The principal feature of this order was, as mentioned, the high status accorded to the Geneva Convention.³⁵
2. Order Concerning Security Provisions (No. 378) 5730 – 1970: The principal features of this order were the abrogation of the right of veto held by any judge in the panel,³⁶ and revocation of the referral to international law, namely the Geneva Convention. This left the command hierarchy intact but a vacuum in relation to judicial independence.
3. Order Concerning Security Provisions (Amendment No. 10) (Judea and Samaria) (No. 585) 5735 – 1975: This order vested the Military Attorney General³⁷ with powers over the judicial authority in the Region.³⁸

34 Thus, for example, in 2004 the military courts heard 100 murder cases and 619 cases of attempted murder out of 1055 cases heard by a panel of three judges (a total of 10 judges from the permanent army sat in the court of first instance). For the purpose of comparison, a review of the *Nevo* Internet site discloses 68 judgments on charges of murder filed in 2004, given by all the District Courts in Israel. See <http://www.nevo.co.il> (last visited May 9, 2012).

35 *Supra* note 28.

36 Section 20 of the 1967 Order provided that “a military court shall not find a person liable save by unanimous decision of the President and members”. This section was not inserted into Order No. 378 and has not been renewed since then.

37 The Military Attorney General is the highest legal authority in the IDF. See *Military Justice Law*, *supra* note 2, at §§ 177-179. The rank of the Military Attorney General is General. According to the Supreme Court decision, he is answerable to the Attorney General. See HCJ 4723/96, *Atiya v. Attorney General* (1997).

38 Thus, for example, the power to select judges was transferred to the Military Attorney General. See § 1 of the amending order (585) and § 3(c) of Order No. 378.

4. Order Concerning Security Provisions (Amendment No. 46) (Judea and Samaria) (No. 1082) 5743 – 1983: This enhanced the power of the Military Attorney General to intervene in judgments and decisions.³⁹
5. Order Concerning Security Provisions (Amendment No. 53) (Judea and Samaria) (No. 1217) 5748 – 1988: This order included, for the first time, a judicial independence provision.⁴⁰
6. Order Concerning Security Provisions (Amendment No. 58) (Judea and Samaria) (No. 1265) 5749 – 1989: This order established a Court of Appeal, following a High Court of Justice⁴¹ decision calling upon the legislature to consider this.⁴²
7. Order Concerning Security Provisions (Amendment No. 62) (Judea and Samaria) (No. 1309) 5751 – 1990: This order revoked the power of the Military Commander of the Region to intervene in judgments of the military court,⁴³ and instead created a Military Court of Appeal.
8. Order Concerning Security Provisions (Amendment No. 89) (Judea and Samaria) (No. 1550) 5764 – 2004: This order effected an almost complete transition to professional adjudication, by establishing a Judges Selection Committee and revoking the dependence on the Military Attorney General.⁴⁴

In the light of the legislative and historical changes that took place, we chose to examine the development of the military courts through four prisms used to characterize a judicial authority, *mutatis mutandis*:⁴⁵

39 For example, to order the annulment of part of a judgment, *see* §1 of the amending order (1082).

40 § 1 of the amending order (1217); §7A of Order No. 378.

41 The Supreme Court of Israel sits, *inter alia*, as a High Court of Justice. In this capacity, it has the power to criticize any administrative authority, including the IDF.

42 HCJ 87/85, *Argov v. Commander of IDF Forces in the Region*, 42(1) PD 353 [1988]. Although the appeal was technically dismissed, Chief Justice Meir Shamgar was very clear in his words regarding the need to enable the possibility of appeal: “judicial process should be administered and finished in a reasonable time. However, it is not a race against time and the duty to follow accepted rules of due process is to be preferred. . . . One we adopted the right to appeal to at least one instance as a substantive part of our judicial process, the inference that every judicial system we hold must be built on the same base rises from itself.” *See* ¶¶ 16-17.

43 *See* §§ 1-3, Order No. 1550, repealing §§ 41-43, Order No. 378.

44 *See* § 3(b), (d) of Order No. 1550.

45 *Cf.* Shimon Shetreet, *Judicial Independence: New Conceptual Dimensions and Contemporary Challenges*, in *JUDICIAL INDEPENDENCE* 590, 594 (Shimon Shetreet & Jules Deschenes eds., 1985).

- manner of selecting and ending judges' office;
- qualifications of the judges to hold office;
- judicial independence; and
- the power of non-judicial entities to change judgments.

1. Manner of Selecting and Ending Judges' Office

With the establishment of the military tribunals in the Region, the appointment of the judges (who were called the “president” and the “members”) was performed by the “Commander of the Region” and was subject to his sole discretion, which could not be delegated. No rules were established for termination of office. In 1970, the legislation was amended so that a “Military Commander”, and not the “Commander of the Region”, performed the appointment of judges. The Military Commander could have been a soldier – of any rank – who was appointed by the Commander of the Region and granted power in a delineated area.⁴⁶ Moreover, the Commander of the Region could delegate any power, including the power to appoint judges, to “another person”. In 1975, it was held that the appointment of the legally qualified judges (who were termed “jurists”) would be made by the Commander of the Region, in accordance with the recommendation of the Military Attorney General.⁴⁷ No statutory procedure was established for terminating the office. In practice, the judges were drawn from the ranks of the Military Attorney General’s Unit. These officers were selected by the Military Attorney General from among the serving officers, and were then appointed by the Commander of the Region. To the best of our knowledge, the Military Attorney General himself or his deputy selected both, the judges and the prosecutors, from the Military Attorney General’s Unit in the same manner.⁴⁸ The provision that enabled the appointment of non-expert judges was left unchanged and these appointments were made by the Military Commander of the Region.

46 It should be noted that the Commander of the Region retained the power to appoint a single judge.

47 *Supra* note 37.

48 During August 2007, we interviewed nine people who had officiated as permanent judges in the Region during the period up to 2004 (when the judges selection committee was established). All of them responded that they had been selected by the Military Attorney General or by a selection forum of the Military Attorney General’s Unit; none had been interviewed by the Commander of the Region prior to his selection and most of the judges had never met the Region Commander.

In 2004, a significant statutory amendment enabled the establishment of a Judges Selection Committee. The committee consisted of army officers and civilians: the President of the Military Appeal Tribunal; the Deputy President of the Military Appeal Tribunal, a retired civilian judge who is appointed by the President of the Military Appeal Tribunal; the President of the Military Court of Appeal; a representative of the Israel Bar Association; the Coordinator of Activities in the Region, who is generally an officer of the rank of General; and the Head of the Human Resources Branch in the IDF.⁴⁹ In our opinion, it would have been appropriate to equate the status of the committee and its membership to that prevailing in the committee selecting judges for Israeli courts. This committee includes representatives of all governmental authorities - members of Parliament, ministers, Supreme Court judges and representatives of the Israeli Bar Association.⁵⁰ Even the committee that selects judges for the military tribunals in Israel includes ministers and Supreme Court judges.⁵¹ That is to say, the hierarchy of the parallel committees' members is higher.⁵² In view of the scope of power of the military court in the Region, the gravity of the matters with which it dealt, and the extent of its activities, the highest representatives of all governmental and army authorities should have also composed the selection committee of its judges.

The issue of termination of judicial office was statutorily regulated for the first time by means of the 2004 amendment to the Order.⁵³ The President of

49 See Order No. 378, § 3(d)(1).

50 § 4, Basic Law: Adjudication, SH No. 1110, p. 78.

51 Military Justice Act, §187.

52 For criticism of the panel, see Lekach, *supra* note 29 (asserting that this difference indicates the underestimation assigned to the military courts in the Region compared to the military tribunals in the Region).

53 See Order No. 378, § 3(g):

'The office of a judge shall not be terminated, without his agreement, save for one of the following reasons:

- 1) *Where the selection committee has determined, on the basis of a medical opinion in accordance with rules established by it, that by reason of his medical condition he is prevented from performing his function;*
- 2) *In accordance with the decision of the selection committee, proposed by the chairman of the committee or the President of the Military Court of Appeals;*
- 3) *In accordance with the decision of the President of the Military Appeals Tribunal on organizational grounds, including grounds relating to the scope of activity;*
- 4) *The office of a judge who belongs to the reserve forces of the IDF will terminate, in addition to the aforesaid in this subsection, if he ceases to belong to the reserve forces of the IDF?*

the Appeal Tribunal was empowered, *inter alia*, to terminate the office of a judge “on organizational grounds, including grounds involving the extent of activities”. In our view, this power raises a number of questions; for example, is it right to accord the power to remove a judge from office to a single person, without any obligation to consult, even if the office is an exalted judicial one? Does this power – worded in an overly vague manner as the expression “organizational grounds” – embrace almost any reason, however subjective?⁵⁴ Does the fact that a judge is faced with the risk of dismissal on “organizational grounds” impair his judicial independence?

There is no doubt that behind this provision lies a concern over changes to the legal status of the Region. This concern is justified, and moreover, has demonstrated itself to be so in the past.⁵⁵ Nonetheless, this concern does not justify such a sweeping power and it would have been possible to define a change in “the extent of activities” as a change ensuing from the implementation of a political policy. At the same time, these reservations, however great, do not lessen the importance of the amendment, which for the first time created a genuine separation of powers, that is to say, rescinded the military court’s dependence on the Military Attorney General’s Unit, enabled the selection of civilian judges – from outside the ranks of the permanent army – and entrenched judicial independence.⁵⁶

54 For example, an organizational ground may include the need to appoint a new judge instead of a veteran judge; a different court president instead of a president who has been dismissed; where it is necessary to maximize the efficiency of retirement arrangements; and even where certain decisions of the judge have led to cases being stacked or to an economic burden which has proved to be onerous for the military courts as an organization.

55 Israel’s unilateral disengagement from the Gaza Strip led to the repeal of the jurisdiction of the military court over the residents of the Gaza Strip in 2005 and today these residents are tried by the District Court of Be’er Sheva. *See* the Order Implementing the Disengagement Plan (Gaza Strip), 5765 – 2005, which ended the state of occupation of the Gaza Strip.

56 Insofar as we know, until the establishment of the committee, judges were only appointed from among the ranks of the Military Attorney General’s Unit. Since the establishment of the committee, numerous persons have submitted their candidature, including civilian attorneys acting as civilian prosecutors and defense counsel, reserve judges in the military courts, judges working in the courts in Israel or in the military tribunals in Israel, and members of the Military Attorney General’s Unit in the permanent army, in the reserve forces or who have retired. The committee made its selections in an orderly process, almost identical to the procedure applied by other committees operating in Israel, including talking to referees, conducting a personal interview and discussion. Since the establishment of the committee, 12 new permanent judges have been selected; these include five judges who did not belong to the permanent army prior to their

2. Qualifications of Judges to Hold Office

Upon the establishment of the military court in the Region, the “president” was defined as an officer of the rank of Major, possessing “legal qualifications”. The provision did not define this qualification, nor did it set a minimum age or require a specific number of years of experience. The other “members” of the court could be officers performing any function, of any rank and age. The 1970 amendment lowered the minimum rank of the president to the rank of Captain.⁵⁷ Naturally, lowering the minimal rank of the legally qualified judge meant lowering the level of qualifications relating to age and legal experience. The Order did not set out more detailed qualifications for the jurist judge beyond the vague phrase “legal qualifications”. The non-expert “members”, who were now termed “judges”, were to continue to be drawn from among the ranks of IDF officers.

The 2004 amendment negated the possibility of appointing judges that were not jurists. Clause 3(b) of the Order provides that a “Military Commander in the Region will appoint, in accordance with the choice of the judges selection committee... (1) IDF officers of the rank of captain or of a higher rank, possessing at least 5 years legal experience, to hold office as judges”.⁵⁸ According to Clause 4, as drafted then and as retained to this day, a military court of three will comprise “three judges”, where the term “judge” no longer includes a non-expert judge.⁵⁹

selection, three male and three female members of the permanent army who served in the Military Attorney General’s Unit and one judge who until his selection had served in a military tribunal. From among the judges who were civilian attorneys prior to their selection, three served in the regular army or in reserve units in combat postings, which were unconnected to the Military Attorney General’s Unit. Three permanent judges were selected for the Appeals Court; all three had acted as judges previously: two in the military court in Judea and one in the Southern Command Military Tribunal.

57 It should be noted that the term “rank” also includes the “representative rank”, which was routinely accorded to any person appointed to act as a judge even if the latter was not authorized to be an officer in the army.

58 It should be noted that the rank of captain is not an obstacle; if necessary, the Committee will award a representative rank in order to satisfy the statutory requirement.

59 *See also*, Amit Preiss & Chagai D. Vinizky, *Classification of Participants in Suicide Attacks and the Implications of this Classification on the Severity of the Sentence: The Israeli Experience in the Military Courts in Judea and Samaria as a Model to Other Nations*, 30 *PAGE L. REV.* 720, 723 (2010) (giving an overview of the legal regime and explaining that the trial is conducted solely by judges possessing legal educations).

For the first time, the minimum period of legal experience was defined. The expression “legal experience” is vague and makes it difficult to understand what qualifications are indeed required: does the experience include all legal work? Is a period of legal training included? We believe that it would have been right to define this term in a more precise manner, similar to the definition of the experience of a magistrate⁶⁰ or a judge in a military tribunal.⁶¹

3. Judicial Independence

Judicial independence is perceived as an essential condition to the maintenance of two of the fundamental principles of a democratic state – rule of law and separation of powers. In order to achieve judicial independence, it is important to guarantee its components, both at the institutional and at the personal level. By structural components such as tenure – a certain salary level, setting panels and allocation of files etc. – the system tries to ensure that the discretion of the judge is exercised independent of governmental forces, the public agenda and other judges’ opinions.⁶² Thus, it is highly important to examine if and when the conditions for judicial independence of the military courts in the Region were met.

Until 1988, there was no provision dealing with judicial independence. At the same time, when the law prevailing in the Region on June 7, 1967 was in effect,⁶³ it was possible to adopt the principle of judicial independence from the Jordanian Judicial Independence Act of 1955.⁶⁴ In practice, the result was that as the judges were army officers, they were subordinate in terms of the command structure to higher ranking officers, even if the latter were acting as prosecutors.

The judicial independence provision was not foreign to the legislative authorities in 1970, the time of the enactment of Order No. 378. Thus, for

60 Courts Act, § 4.

61 Military Justice Act, § 185.

62 See Eli M. Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?* 13 INT’L REV. L. & ECON. 349, 350-352 (1993) (analytical definition of judicial independence).

63 See, Proclamation regarding Administration and Law (No. 2), 5727 – 1967, Collation of Proclamations, Orders and Appointments (CPOA) 1, at 3.

64 See, *The Law in Arab States*, in 2 COLLATION OF JORDANIAN ACTS 164 (1977) (translated from Arabic). A number of appointments under this law were published in the CPOA, Issue no. 21, in which Order No. 378 was also published.

example, a similar provision already existed in the Military Justice Law⁶⁵ and also in other legislation appearing in the same collation of proclamations, orders and appointments in which the Order was published.⁶⁶ Accordingly, it should not be assumed that this term was accidentally omitted or that it was not customary to employ this term. It may, therefore, be assumed that what was intended was an *argumentum a contrario* and that notwithstanding the importance of the principle, the legislature did not intend to entrench expressly the judicial independence of the military court in the Region.

In the 1975 amendment, the status of the Military Attorney General was greatly elevated and he was accorded powers to control the judicial process. Not only did the amendment not lead to the inclusion of a judicial independence clause; it also vested the executive authority with powers to control the judiciary. In addition to the judges belonging organisationally to the Military Attorney General's Unit, their appointment, promotion and professional career depended on the Military Attorney General himself.

In 1988, a judicial independence clause was enacted in the following terms:⁶⁷ "In judicial matters, a person holding judicial powers shall not be subject to authority, save the authority of law and security regulations".⁶⁸ At the same time, the subordination to the executive authority only ended in practice in 2004 when the power of the Military Attorney General to appoint judges was revoked and a selection committee was established.⁶⁹ In addition, that same year, the Army Chief of Staff issued a decision ordering the administrative separation of the Military Attorney General's Unit from the Military Courts Unit. This trend, which was supported by the enlistment of professional reserve judges from the whole army, greatly reduced the formal and informal personal subordination that had

65 See, Military Justice Act, § 188.

66 See, e.g., Order regarding Re-registration of Companies (Judea and Samaria) (No. 362) 5730 – 1969, § 18, which was published in the CPOA Issue no. 21. The provision guaranteed the independence of the Appeals Committee in relation to the registration of companies.

67 Order regarding Security Provisions (Amendment No. 53) (Judea and Samaria) (No. 1217) 5748 – 1988.

68 Order No. 378, § 7A.

69 Order regarding Security Provisions (Amendment No. 89) (Judea and Samaria) (No. 1550) 5764 – 2004.

existed between the judges and the Military Attorney General's Unit, and created a heterogeneous body of judges who reflected a range of positions, opinions, qualifications, seniority and life histories.

Emphasis of this idea is found in the comments made by the Military Attorney General of the time, Menachem Finkelstein, before the Foreign Affairs and Defence Committee of the Knesset, prior to the end of this period of subordination:

An organizational change carried out, which I welcome, is that up to a few months ago, the military courts in the territories were subject to the Military Attorney General, this has been the case since 1967. We thought that it was not good, and we approached all the legal bodies, and it took a long time. In the end we succeeded. As of three or four months ago, the military courts in the territories belong to the judicial system and not to the legal system.⁷⁰

4. The Power of Non-Judicial Bodies to Change Judgments

From the time of the establishment of military courts in the Region until 1989, the validity of judgments was contingent upon the approval of the Commander of the Region. In addition, the Commander of the Region had the following powers: to confirm liability or sentence; to negate the findings of the court; to acquit the accused and order his release; to lighten or waive the punishment; and to cancel the entire hearing and order a new trial before a different panel. The Commander of the Region was not required to give reasons for any of these decisions. Moreover, an accused was entitled to apply to the Commander of the Region without constraints of court procedure or time, and the ability of the Commander to make the change was not limited by time. In

70 RECORD OF THE CONSTITUTION, LAW AND JUSTICE COMMITTEE 291 (Aug. 18, 2004). *See also* his comments in the RECORD OF THE CONSTITUTION, LAW AND JUSTICE COMMITTEE 154 (Feb. 10, 2004):

'A further matter, and this is also an achievement which must be welcomed and which should interest the committee, is that up to now the courts have been subordinate to the Military Attorney General's Unit. I thought that this situation was wrong, even though it is possible from the point of view of international law; however, since the courts have already been operating for many years and with the approval of all the legal heads in Israel, I have received confirmation of this from many sources, it was decided, and this will be carried out shortly, to place the courts under the umbrella of the military tribunals. In other words, the military courts will no longer be subordinate, the judicial branch will no longer be subordinate to the executive authority, but will be subordinate to and under the umbrella of the judicial authority, this is also a change or revolution which is worthy of being reported.'

other words, the Commander of the Region held powers that included, and even exceeded, the powers of an appeals court.

In 1975, a significant amendment was introduced to the effect that the power to annul an acquittal and send the accused for a new trial was from then on to be subject to the recommendation of the Military Attorney General.

An interesting provision added in 1983,⁷¹ empowered the Military Commander, upon the recommendation of the Military Attorney General, to cancel part of a trial in such a manner that the new court (which, too, would be selected in accordance with the recommendation of the Military Attorney General) could confine itself to hearing the cancelled part of the case and not the entire proceedings. This provision, which permitted unlimited interference and manoeuvring, did not restrict the number of times in which a portion of the proceedings could be cancelled. Accordingly, every court knew that its judgment was subject, in whole or in part, to cancellation upon the recommendation of the head of the prosecution, and that the latter could again cancel it, as often as he liked, and refer it to another chosen court – until a judgment was given which gained his approval.

In a 1989 amendment, the power to hear an appeal was transferred to the Military Court of Appeal, following a judgment of the High Court of Justice which called upon the legislature to take this action.⁷² The judges of the Military Court of Appeal were appointed on the recommendation of the Military Attorney General and included non-expert judges who had to hold the minimum rank of lieutenant-colonel. Beyond this, qualifications, experience and age were not defined. An empirical study of the Military Court of Appeal exceeds the scope of this article, which focuses on the court of first instance. At the same time, it should be understood that the same line of thought which led to the appointment of judges without legal qualifications in 1967 in the court of first instance remained valid, 22 years later, with the establishment of the Military Court of Appeal, notwithstanding all the problems involved.

71 Order regarding Security Provisions (Amendment No. 46) (Judea and Samaria) (No. 1082) 5743 – 1983.

72 See §1 of the amending order (1082).

In an additional order promulgated in 1990,⁷³ the last powers held by the Commander of the Region to intervene in the sentence were revoked. From then onwards, these powers were confined solely to the Military Court of Appeal.

IV. THE TRANSITION FROM PANELS INCLUDING NON-EXPERTS TO PROFESSIONAL PANELS

In 2001, a young military officer called Omer Barak approached the Knesset and the media, calling for his removal from the ranks of the judges in the Region. This call came after he was summoned to act as a judge both during his regular military service and following his discharge from the IDF as a part of his reserve duty. His arguments were ones of principle, including what he claimed was the impropriety of someone who was not a jurist trying grave criminal cases which required expertise and which might end with a heavy prison sentence.⁷⁴ His article and complaint resulted in the Foreign Affairs and Defence Committee of the Knesset convening a hearing.⁷⁵ During the course of the debate, criticism was voiced at the phenomenon of non-experts sitting as judges and in response, the Committee was given an undertaking that from then onwards, only jurists would be appointed as judges.⁷⁶

73 Order regarding Security Provisions (Amendment No. 62) (Judea and Samaria) (No. 1309) 5751 – 1990.

74 Amos Harel, *The Military Tribunals in the Territories: Judges Without A Legal Education Impose Sentences of Imprisonment*, HA'ARETZ, Dec. 16, 2001.

75 Lior Greenbaum, *Side Judges Will Be Required to Possess a Legal Education*, GLOBES, Feb. 14, 2002, available at <http://www.globes.co.il/news/home.aspx?fid=2&did=565288>.

76 From *The Week that Was in the Knesset Committees* (session of Jan. 27, 2002; we were not permitted to review the entire record):

***Non professional judging.** We shall conduct a swift hearing at the initiative of Zehava Galon (Meretz) regarding the burden on the tribunals and the military detentions resulting from the security situation. The focal point of the debate was the appointment of judges who do not have a legal education to the military tribunals in the territories. Gilon said that judges were appointed even if they did not have qualifications or sufficient life experience to try Palestinian detainees. According to her, these officers could sit in a disciplinary trial of a soldier who did not wear a hat, but they could not make judgments in life or death matters. She also noted the significant difference in rank between the side judges and the head of the panel who was a professional jurist, which could interfere with their independence. In her opinion, there was a perversion of the principle of due process here. The Deputy Military Attorney General, Col. Ilan Katz, stated that 1,100 Palestinians were being detained in the Territories on suspicion of terrorist activities and that within a year there would not be any side judges from the regular army but only from the reserve forces. Gilon rejected the explanation and demanded the immediate annulment of the phenomenon of non-jurist judges in the tribunals.*

Available at <http://www.knesset.gov.il> (last visited July 2, 2007) (emphasis in original).

During 2002, a broad recruitment drive was carried out to enable the transition to a professional panel of judges. Reserve judges were recruited and appointed; most were senior lawyers who were serving in various reserve units,⁷⁷ or who had already been discharged from reserve duty but now volunteered.⁷⁸ These jurists were appointed as judges following review by the President of the Military Court of Appeal, who ensured, even without being required to do so by legislation, that the jurists possessed the qualifications needed by a judge in the Magistrate's Court. Beginning in 2004, the reservist judges were appointed by the Judges Selection Committee, in accordance with the qualifications required by the relevant military order.⁷⁹

Thus, this arrangement of trial by mixed panels of non-expert and expert judges came into existence in unclear circumstances and departed in an equally interesting manner. Its departure was not prompted by an ordinary legislative initiative but by the actions of one man, not a lawyer, who understood that he was not qualified to try persons accused of serious criminal offences, and who therefore believed that it was necessary to change the entire trial system. As of 2002, the judicial panel has been made up entirely of jurists, the majority of whom are experienced senior lawyers. The level of judicial autonomy is high and entrenched in law, and the majority of the judges are completely independent of the Military Attorney General's Unit.

A historical review therefore reveals that the institutions that conducted trials in the Region changed gradually, but considerably from 1967 until the present. Today, their professionalism is entrenched in legislation. Clearly, the legislation is not the most important thing; it is not possible to regulate the acquisition of values of fairness and courage by legislation. At the same time, the legislation that revoked the dependence of the judges on their commanding officers and

77 The reserve soldiers that answered the call were not necessarily former members of the Military Attorney General's Unit, but were also former Israeli judges and officers from other reserve combat units.

78 This was the period after the "Defensive Shield" campaign. The burden on the military courts in detention cases and in serious crimes increased and reached more than 3000 cases per year for every permanent single judge. This led to people volunteering even though they were exempt from reserve service.

79 § 3(b) of Order No. 378 required at least five years of legal experience.

entrenched the former's judicial independence also marked the boundaries of power of the institution.

Maintaining independence and autonomy are preconditions imperative for the court to take its place among the separate powers that scrutinize each other.⁸⁰ When criminal cases are involved, it is necessary to uphold universal principles regarding fact finding, collecting evidence, the presumption of innocence, the principle of legality, due process, the right to be heard and the like.⁸¹ Determining guilt and imposing sentences in an independent forum are preconditions for proper administration and human freedom.

V. METHODOLOGY

Previously, we reviewed the development of the legislation in the Region, primarily in relation to matters affecting the expertise and independence of the judges of the military courts. These changes in the structure of the military courts were studied to determine what impact they might have on judicial deeds. We have chosen to establish this connection in a quantitative-empirical study. The assumption underlying the study is that the transition that took place in 2002 strengthened the judicial facet of the side-judge, that is to say, brought about measurable changes in the judgments and sentences. We have sought to examine this change by means of a quantitative analysis.

A quantitative analysis of processes or systems of facts enables us to draw or support a number of conclusions relating to the following:

- Is the system stable or variable?
- Do the variations have a particular clear-cut direction?
- What is the direction of the variations?
- What is the differential rate of the variations?

80 *Cf.*, SHIMON SHETREFF, ON ADJUDICATION: JUSTICE ON TRIAL 200 (2004). According to the author, a tribunal composed of army officers cannot be regarded as independent because "their institutional conflict of interests will leave in doubt the extent to which they are impartial."

81 For the connection between procedural criminal law and basic human rights, see Ariel Bendor, *Criminal Procedure and Laws of Evidence: Developments in Basic Human Rights in Procedural Criminal Law*, ISR. Y.B. (Ariel Rosen Zvi ed., 1996).

The answers to these questions may enable us to offer a well-founded logical connection between the cause and effect. Identifying this connection is the purpose of every scientific study.

The idea that statistical methods can better reveal some influences of legal institutes was common in the United States in the 1950s and 1960s and was considered as a separate academic branch named *jurimetrics*.⁸² In recent years, modelling and the use of quantitative language have become prevalent and legitimate in various areas of legal research all over the world.⁸³ We too have chosen to quantitatively examine the change in the quality of the judgments delivered in serious crime cases by comparing various values in a representative sample of cases. The **examined group** is a group of cases heard to completion by a panel consisting of one legally qualified judge and two non-expert judges (“a mixed panel”).⁸⁴ The **control group** is a group of cases heard to completion by a panel of three legally qualified judges (“an all jurist panel”). In all the cases, the court being considered was a court of first instance and not a court of appeal.

1. Method of Sampling

All of the cases in the control group were opened in 2003. That particular year was chosen because, as of the date of conducting the study, that was the first year in which all the cases opened were heard by a panel comprising solely of legally qualified judges and among the cases, none remained pending before the court at the time of the study. In addition, we had to neutralize the factor of the Judges Selection Committee, which was established in 2004. One hundred cases from the above group were sampled in a random manner according to their file number. The group was taken from the full database of cases, which was available for study in the IDF archives.⁸⁵ The cases reviewed were the original

82 See, e.g., GLENDON SCHUBERT, *THE JUDICIAL MIND REVISITED: PSYCHOMETRIC ANALYSIS OF SUPREME COURT IDEOLOGY* (1974).

83 See Salzberger, *supra* note 6, at 553.

84 Cases that commenced before a panel but ended before a single judge were reviewed within the framework of the sequential examination but not included within the sample.

85 *IDF Archives*, <http://www.archives.mod.gov.il/>. The Archives, however, are only accessible to the public under permission of the President of the Military Court of Appeal, who retains the authority to give a research license.

paper files (in contrast to computerized files); we selected only those that included an indictment, a judgment and a sentence.

The examined group included files that were opened before 2002⁸⁶ and were heard and concluded by a mixed panel comprising a legally qualified judge and non-expert judges. The review was based on archive files that were examined in sequential order, from the newer to the older cases. Within this framework, about one thousand random cases were examined, out of which one hundred files were found that were suitable for the sample, that is to say, were complete, legible and included an indictment, a judgment and a sentence.⁸⁷

2. The Quantitative Values

The values we examined are the following:

- i. The nature of the primary offence in the indictment: This value allowed us to determine the severity of the offence alleged. It was examined in order to make sure that we considered a similar sample field and that no drastic changes had occurred in the types of charges being heard.
- ii. The lifespan of the file (in days): This value enabled us to examine the influence exerted by the identity of the panel on the lifespan of the procedure. In addition, we separately compared the lifespan of the files in murder cases, in order to neutralize the element of the severity of the offence in both cases.
- iii. The relationship between the indictment and the verdict: This value enabled us to examine the influence exerted by the panel conducting the hearing on the fate of the original indictment.
- iv. The manner of conducting the trial (in regard to the verdict and not the sentence): This value allowed us to consider the frequency of the different modes of conducting the cases and identify a trend in the manner of conducting the trial.

86 The reason the examination did not compare year to year was that before the second *intifada*, there were fewer cases, *i.e.*, it was difficult to find 100 cases suitable for the sample from a single year, thus requiring the examination to be conducted over a period of years.

87 The reason for the increasing number of court cases after 2002 is the Second *Intifada*'s events, which caused hundreds of murder and assault events.

- v. The acquiescence of the side-judges with the presiding judge regarding the verdict: This value enabled us to assess the change in the influence exerted by the presiding judge over the whole judgment on one hand, and the dominance and independent thinking of the side judges on the other. The object was to understand whether, and to what extent, the non-expert judges yielded to the opinion of the presiding judge.
- vi. Extent of reasoning in the verdict: This value allowed us to weigh the seriousness of, and investment in, the reasoning. The assumption was that, while a short judgment might be thorough and exhaustive, serious crimes heard by a panel warranted an appropriate level of reasoning, and such reasoning took up space.
- vii. The number of references to legal resources in the verdict: This value allowed us to examine whether legal-professional attention was given to the judgment.
- viii. Agreement as to sentence: This value was sampled primarily as an aid to understanding the conduct of the hearing and the other values falling within it, in view of the anticipated connection between cases that involved evidentiary hearings (and therefore a need for more extensive reasoning), compared to cases of plea bargains (which included an admission of the charges set out in the indictment).
- ix. The extent of reasoning in the sentence: This value allowed us to weigh the seriousness of the reasoning and the investment required to determine the sentence of a person convicted of serious crimes.
- x. The number of references to legal sources in the sentence: This value enabled us to consider the degree to which sentencing precedents were referred to and the importance accorded to uniformity of sentencing.
- xi. Acquiescence by the side-judges with the presiding judge regarding sentence: This value potentially indicated the degree of independence or lack of independence of the side-judges in determining the appropriate sentence for a convicted offender. Naturally, the significance was not measured in relation to all the files but in relation to the group of cases in which there was no agreement between the parties regarding the sentence.⁸⁸

88 An examination of part of the relevant sample is known as conditional probability and is regulated by a formula termed as the Bayes' Theorem.

VI. RESULTS AND CONCLUSIONS

In this section, we will set out the numerical results of the values presented above and suggest explanations for these results. Since the database is out of hundred in each group, we will present most of the results using regular numbers.

1. The nature of the primary offence in the indictment

The Primary Offence	Mixed Panel	All Jurist Panel
Deliberately causing death (equivalent to murder)	16	18
Attempt to deliberately cause death (equivalent to attempted murder) or laying a bomb	30	73
Membership, activity, or holding an office in an impermissible (terror) association	32	0
Throwing a burning object	12	0
Injuring, offences using devices of war, and others	10	9

Trend: There was a significant increase in the number of the serious offences of murder and attempted murder before the all jurist panels. Offences relating to impermissible associations and throwing burning objects ceased to be heard by a panel.

Suggested Explanation: Events in the Region, and the worsening of the security situation during the years 2001–2002, led to an increased number of serious indictments being heard by a panel. At the same time, the sample field did not change in the sense that no offences of a different nature were added and the powers of the court did not change.

2. The lifespan of the file (in days)

General Details	Mixed Panel	All Jurist Panel
Average lifespan of a file	650	339
Average lifespan of a murder case	556	520

Trend: There was a reduction lessening in the time span for hearing cases, notwithstanding their increased gravity.

Important qualification: The comparison of the files was not carried out in relation to either the same number of years or the same number of judges. Neither were factors that have an impact on the pressure placed on the court considered, nor was the time span of the case.

Suggested explanation subject to the above qualification: The proper management of a serious crime case results in a shortened time span for the hearing. Thus, proper management may lead to a change in the indictment by way of the agreed withdrawal of charges, admission of other charges and the like, in order to focus the hearing on the important points in dispute. This result is strengthened in view of the fact that there is greater organizational difficulty in summoning a panel comprising reserve officers, compared to a professional panel consisting entirely of permanent army officers.⁸⁹

3. The relationship between the indictment and the verdict

The result of the judgment	Mixed Panel	All Jurist Panel
Acquittal for the serious portion of the indictment	4	5
Conviction for the serious portion, or all of the indictment	92	54
Withdrawing or converting charges in the serious portion of the indictment	4	41

Trend: The number of acquittals, conversion of charges or significant withdrawals grew from 8 to 46. The number of convictions (including minor withdrawals) lessened significantly. In other words, the all jurist panels intervened in a significantly higher number of indictments brought before them and the conduct of the case led to the dismissal, withdrawal or conversion of a portion of the indictment.

Suggested explanation: A high degree of intervention in the indictment generally indicates discretion being exercised by the court and confidence on the

⁸⁹ It is important to note that there is no difference in the ability of summoning witnesses or collecting evidences between the two periods.

part of the opposing sides in the court. A rise in the number of cases of plea bargains that included a significant withdrawal or conversion (that is, plea bargains regarding the verdict and not the sentence) indicates that the sides produced creative solutions as a result of evidence being heard in the court, as well as that the court was considered less “predictable” from the point of view of the outcome. Lawyers appearing before non-experts tend to fear making an admission, for example, in return for withdrawal of charges, because of their concern that a non-expert will not be able to disregard the history of the file. On the other hand, where a case is heard by professionals, it is assumed that the withdrawal will put an end to the particular charge and will allow the continuation of the trial.

4. The manner of conducting the trial

	Mixed Panel	All Jurist Panel
Agreement without the need to hear evidence	96	82
Evidence which ended with agreement	2	11
Evidence which ended with a reasoned verdict	2	7

Trend: There was a steep rise in the management of evidentiary hearings (*i.e.*, hearing witnesses), as well as a rise in the number of cases in which evidentiary hearings commenced and the sides subsequently reached an agreement.

Suggested explanation: This trend indicates that the parties anticipated that the court would intervene in favour of the accused. In other words, where the panel was an all jurist panel, the process was less predictable from the point of view of the sides; this led the prosecution and the defence to negotiate in order to draw a balance between the risk and a potentially more favourable outcome. This conduct led to the dynamics of the process. On the other hand, the mixed panels of a jurist and non-experts saw a very high rate of agreed convictions, where almost no full or even partial evidentiary hearings were held. Such a rate of agreed convictions may indicate that the sides felt that in general the court would accept the evidence brought by the prosecution and that they possessed little bargaining power.

5. The acquiescence of the side-judges with the presiding judge regarding the verdict

	Mixed Panel	All Jurist Panel
Acquiescence with the presiding judge	100	93

Trend: There was a decrease in the number of cases where the side-judges agreed with the presiding judge. Whereas in the mixed panels there was agreement in all the cases sampled; in the expert panels, differing opinions were delivered in 7 cases: dissenting opinions, single opinions, etc. On occasion, the outcome was identical to that reached by the presiding judge though based on a different rationale; on occasion, the two side-judges disagreed with the presiding judge and the latter was left in the minority. On occasion, the dispute was over an important interlocutory decision and on occasion, over the outcome of the verdict itself.

Suggested explanation: The expert panels create an atmosphere conducive to the independent exercise of discretion and genuine adjudication by the three judges. In contrast, when a jurist sits as the head of a panel and two judges who are not legally qualified sit alongside him, there is a fear that the two non-experts will yield to the legally qualified judge. We fear that a panel including a non-expert purports to be a panel of judges, but sometimes it is actually no more than a single judge accompanied by two side-judges who merely rubber stamp his decisions. This problem has also arisen in the judgments of the ordinary military tribunals (which try soldiers);⁹⁰ this is reflected in the results of the sample.

6. The extent of reasoning in the verdict

	Mixed Panel	All Jurist Panel
Number of files in which reasoning was set out	14	19
Average length of reasoning (written lines)	15 lines	358 lines

Trend: There was a steep increase in the extent of reasoning.

⁹⁰ Misc. App. 9/96 Corporal Giladi v. Chief Military Prosecutor, Selected Judgments of the Military Appeal Tribunal, [1998] (B) 620.

Important qualification: We are aware that when there is a plea bargain regarding the verdict, the court does not feel obliged to reason its decision. However, we neutralized this factor by checking only those files in which reasoning was set out.

Suggested explanation: This indicates a greater seriousness in reasoning on the part of the expert panel. Even if lengthy judgments are not necessarily evidence of quality, there is no doubt that an average of 15 lines to explain a criminal judgment may indicate a problem in terms of the seriousness of the reasoning. The length of the reasoning is also connected to the dissenting opinions, which we considered in the previous value. The results also indicate an interesting phenomenon connected to the presiding judge herself. It follows from the results that the presiding judge sees fit to give reasons that are hundreds of lines longer when those sitting beside her are legally qualified judges, as opposed to cases where her brethren are non-experts. It is likely that this pattern of conduct ensues from the discourse between the legally qualified judges and the presiding judge, and the need of the latter to ensure thorough reasoning in order to withstand their scrutiny. Such a dynamic is less evident when the side judges are non-experts.

7. The number of references to legal materials in the verdict

	Mixed Panel	All Jurist Panel
Number of verdicts in which there are legal references (one or more)	8	18
Legal references by the presiding judge	0	3
Joint legal references (verdict signed by all three judges)	8	10
Legal references by the side-judges	0	5

Trend: There was a clear rise in the number of legal references with the transition to all jurist panels.

Suggested explanation: The legal process is imbued with a legal character, namely an increased influence of the legal scholarship (“legalization”).

8. Agreement as to sentence

Nature of Argument	Mixed Panel	All Jurist Panel
Bargain regarding the sentence	88	68
Argument regarding the sentence without a bargain	12	32

Trend: The sides chose to plead in relation to the sentence much more often when they were appearing before an expert panel. On the other hand, in mixed panels consisting of a jurist and non-experts, there was a very high rate of sentencing by agreement and almost no full or even partial evidentiary hearings were held.

Suggested explanation: It is difficult to suggest a single explanation for this phenomenon. However, it would appear that it reflects a very high degree of evaluation regarding the sentence on the part of both sides in cases where there is a mixed panel, combined with a lesser confidence in the capacity of evidence and pleadings to change the outcome. These feelings lead to a greater tendency to reach an agreement. In contrast, as previous values showed, where the panel consists entirely of jurists, the outcome is less predictable and the confidence of the sides in their ability to influence the panel leads them to conduct arguments before the court.⁹¹

Note: Because more murder cases were tried in the all jurist sample, and in murder cases, following conviction, pleadings regarding sentence have little impact and consequently are generally not made, the difference is even more significant.

91 A similar trend stemming from other reasons was found regarding the increasing rate of plea bargains in the Old Bailey. As the number of lawyers involved in the process increased (in the 18th and 19th centuries), the number of guilty pleas and then plea bargains increased. See Malcolm M. Feeley, *Legal Complexity and the Transformation of the Criminal Process: The Origins of Plea Bargaining*, 31 *ISR. L. REV.* 183 (1997) (arguing that [jury] trials are for amateurs and once the system becomes more professionalized (in the crudest sense, adding lawyers), the lawyers press for more evidence, shift away from the use of character witnesses etc., and make the process more complicated. Two results: *first*, a small handful of cases go to (much) longer formal trials; *secondly*, there is a dramatic increase in pleas of guilty since lawyers have had a chance to assess the strength of the case prior to trial).

9. The extent of reasoning in the sentence

	Mixed Panel	All Jurist Panel
Average length of reasoning	37 lines	48 lines

Trend: The extent of reasoning jumped more than 25%; this is, of course, a significant rate

Suggested explanation: This depicts a greater seriousness in reasoning. However, this result might also stem from the decreased number of plea bargains regarding the sentence.

10. The number of references to legal materials in the sentence

Features of the Sentence	Mixed Panel	All Jurist Panel
Number of sentences in which there is at least one legal reference	16	25
Average number of legal references in the sentence	0.19	0.75

Trend: The trend is clear and significant. In the mixed panels consisting of a jurist and non-experts, the sentences were explained with the use of legal references in 16 of all the cases sampled. In all the sentences where there were reasons (except for one), only a single judgment was referenced (generally of the military courts). In the all jurist panels, the sentences were explained with the use of legal references in 25 cases. In each sentence, an average of 3 different legal references were found, including references to articles and legal literature, judgments of the Military Court of Appeal, judgments of the Supreme Court and even foreign legal literature.

Suggested explanation: Like the previous values examined, the “legalization” led to greater seriousness in reasoning; this was reflected in references to cases falling outside the confines of the military courts and in the importance attached to uniformity in sentencing.

11. Acquiescence by the side-judges with the presiding judge regarding sentence

	Mixed Panel	All Jurist Panel
Number of pleadings regarding sentences (where there is no plea bargain)	12	32
Dispute regarding the sentence	0	16

Trend: The trend is clear: while the rate of acquiescence with the presiding judge regarding the sentence in mixed panels was very high, the change to all jurist panels led to dissenting opinions being voiced and written in approximately 16% of the cases.

Suggested explanation: All jurist panels create an atmosphere conducive to the independent exercise of discretion and adjudication by the three judges. The change is significant and judicial discretion and independent thought are evident in relation to the elements of the sentence.

VII. SUMMARY

A legal reform in the legislation regarding the judicial panels dealing with serious crimes in the military courts of Judea and Samaria gave us the unique opportunity to research empirically and evaluate the ramifications of the change.

The findings indicate that the transition to adjudication by an all jurist panel has:

- led to a higher degree of influence being exerted by the judicial process on the indictment: a greater number of significant amendments to the indictment and a higher rate of acquittals;
- led to a higher number of verdicts and sentences which contained extensive reasoning and which were supported in writing by the evidentiary material and also included a greater number of legal references;
- led to a higher rate of significant plea bargains (regarding the verdict) and a higher rate of pleadings regarding sentences. This might suggest a rise in the confidence of the parties in their ability to influence the decision of the court.

- increased the range of opinions expressed in the judging process: dissenting opinions, which previously were rare (and actually null in the sample set), have become much more common in verdicts and sentences;
- reduced the phenomenon which sees the side judges yield to the opinions of the presiding judge;
- led to a change in the conduct of the presiding judge herself; the reasoning behind her judgments has become more extensive and contains more legal and factual references.

Even if one can argue that “legalisation” and “professionalisation” of a legal process do not necessarily make it better, there is no doubt that since the souls of the judges cannot be tracked, the only way to investigate the situation is by evaluating their judicial deeds.⁹² When serious criminal processes are involved, the capacities of evaluating evidence, neutralizing irrelevant factors, reasoning the judgments, exercising independent discretion, and so on, are crucial. Hence, the above findings revoke the need to recheck the justifications of the integration of lay judges in the judicial process, in general, and particularly when the rationale of “trial by peers” is not met.

In the Region, there are some indications of a greater public confidence in the Israeli Military Court system over that of the Palestinians. Despite the parallel authority of the Palestinian Administration in certain matters, the Military Courts still deal with many cases relating to sex or property relations between Palestinians. From our personal experience, we find that in cases where such authority overlaps, many Palestinians opt to report cases to Israeli, rather than Palestinian, police stations. This trend might also imply that the transition to an all jurist panel has maintained Palestinian confidence in the Military Courts.

92 Cf. Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581 (1998) (explaining that notwithstanding the problem of case selection bias problem, carefully analyzed data can convey useful information about the legal system).