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"Clerical Mistake in a Judgment" Under Israeli and American Procedural Law – A New Model

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"CLERICAL MISTAKE IN A JUDGMENT" UNDER ISRAELI AND AMERICAN PROCEDURAL LAW – A NEW MODEL

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ABSTRACT

This Article examines the development and efficiency of the procedure for correction of a clerical mistake in a judgment in the Israeli law. As is well known, the procedure offers a short and simple way to correct an error in language within a decision. The litigants may file a motion to correct a decision in the same court that granted it, without having to file an appeal in the appellate court. The difficulty, however, is that this procedure contains three fundamental flaws that might even hinder its purpose: First, the law binds the parties and the court to the same number of days to correct the decision, instead of first determining a fixed time period for the parties to submit a motion and only thereafter the time period for the court. Second, the law does not allow to independently appeal the decision on the motion for correction. Third, this procedure does not include a mechanism that "freezes" the time period to appeal the first decision. The resulting parallel race in time between two procedures forces the parties to simultaneously implement them both: error correction in the court that gave the decision and appeal in the appellate court.

This Article proposes a new model based on the arrangement in American law on this issue. In response to the first of these flaws, it suggests adopting principles from a similar procedure which historically faced the same concerns, the procedure for cancelling an *ex parte* decision. With respect to the second flaw, it proposes allowing a litigant to separately appeal the second decision – the decision on the motion for correction. Regarding the third flaw, this Article recommends "freezing" the time to appeal the first decision, the actual judgment, so that it will begin only when a decision is granted on the motion for correction. This is a sort of statutory extension for filing the appeal. Such a solution for the third flaw will in any event also resolve the first one. This Article examines the procedure under the American legal system that also dealt with similar difficulties. In addition, it establishes a foundation for the proposed modifications and offers new language for the relevant law.

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I. INTRODUCTION

In the Israeli law the Regulations of Civil Procedure[1] determine the procedural rules for regulating legal proceedings. Included within these rules is an entire set of substantive values. The efficiency, simplicity, and speedy completion of the

[1] Civil Law Procedure Regulations, 1984, KT 5744 (Isr.) [hereinafter the Regulations].

proceeding are among the primary purposes of the rules.[2] One of the good examples in which these three purposes meet and materialize is in the procedure for "correction of error in a judgment." The procedure offers the litigants a procedural privilege. In the event that one of them discovers an error in a judgment, he is not obligated to appeal the judgment in the appellate court. He may, instead, return to the same court that gave the decision, even though it has already completed its work and that court may correct its own error. This procedure has many benefits compared with the process of appeal. It is implemented through an interlocutory motion. It is efficient, simple, quick, does not require a court fee and a deposit, and even the court's time for granting the decision is limited. Yet this procedure cannot be regarded lightly, for it is contrary to the well-established finality principle that one cannot return to the same court after it has completed its work.[3] The harm to the interest of the finality of judgment is balanced by a narrow definition of the kind of error that may be corrected through this procedure: error in language, error in calculation, clerical error, oversight or inadvertent omission. A more substantive error cannot be corrected by this procedure.

Does the procedure for error correction indeed make the legal proceeding more efficient and eliminate the need for an appeal in the appellate court? As I researched and examined this procedure, I came to the conclusion that the legislature sought to improve, but detracted from it; wanted to simplify but complicated it; requested to shorten but instead lengthened it, until all the benefits of the procedure disappeared. It is surprising to discover that both the scholars and the courts abandoned the attempt to resolve the problems of this procedure.[4] This Article seeks to offer solutions for the Israeli legal system and will consider the situation in the American legal system as well. Part II examines the advantages of the procedure. Part III examines its inherent flaws. Part IV offers solutions. Part V analyzes the matter under U.S. federal law.

II. ERROR CORRECTION IN A JUDGMENT

A. The Underlying Rationale for the Procedure

According to a widely accepted principle, a court's work is complete upon its granting of a decision in a dispute. After the judgment is issued, the court can no longer be asked to deal with the subject of the litigation, add to its decision, detract from it or correct it. Underpinning the rationale at the basis of this principle, the Supreme Court wrote in the *Sherbet* case:

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2 *See generally* DUDI SHWARTZ, CIVIL PROCEDURE — INNOVATIONS, PROCESSES, AND TRENDS (2007).

3 This principle is different from the American legal system that determines in Rule 59 of the Federal Rules of Civil Procedure a variety of grounds upon which it is possible to request from the same court a modification of the decision. *See infra* Part V.

4 It has been stated in this way: "The problem is that the said provisions raise a variety of problems . . . for all of the abovementioned questions, and for others besides them, there is no answer in the language of Section 81 and it must remain for further consideration," YOEL SUSSMAN, THE LAW OF CIVIL PROCEDURE 911 (seventh edition, Shlomo Levin, ed., 1995).

> The principle of *Functus Officio* is intended to ensure that there will be an end to the proceedings and the disputes between the parties in order to fulfill the value of certainty, legal security and to prevent troubling the litigants after the completion of the litigation. It is also intended to ensure the proper operation of the judicial system and to avoid it having to deal repeatedly with matters in a dispute that have already been decided, while many other disputes that have not yet been determined are waiting [to come before the court].[5]

The principle of *Functus Officio* therefore arises from the principle of finality of judgment that has already become a fundamental principle in legal systems throughout the world.[6] What happens if the parties think that the court made a mistake in its decision? How will they be able to correct the error? Legal systems typically do not allow the parties to repeat their arguments and to bring their evidence again, except in defined and very limited ways.[7]

The usual way to change a judicial decision is to appeal in the higher court. The problem is that this path is hardly strewn with roses: First, the appellant must set forth his story in detail from the beginning, before a different court.[8] For that purpose he must, among other requirements, attach an exhibits file.[9] Second, the appellant must

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5 *See* CivA 9085/00 Shitrit v. Shervat Bros. Bldg. Co., 475 Nevo Legal Database (July 21, 2003) (Isr.).

6 This principle sometimes even supersedes the value of discovery of truth, as Professor Goldstein writes in his article, "Yet the ascertainment of truth, while the primary goal, is not the exclusive one. Thus, for example, in order to attain goals of certainty and the prevention of multiple litigation, rules concerning the finality of litigation (res judicata) may bar a plaintiff from proving what might be a just claim." Stephen Goldstein, *The Influences of Constitutional Principles on Civil Procedure in Israel*, 17 ISR. L. REV. 467, 471 (1982).

7 Such for example, even in the method of appeal, which the legislature allows, new evidence cannot be brought (Regulation 457 of the Regulations) and the same evidence cannot be heard again. The appellate court usually exempts itself from hearing the appeal with the routine argument that the appellate court does not interfere in factual findings that were determined by the first court, which has the direct impression of the witnesses and of their credibility. *See* CivA 445/82 Chen v. Shitrit, 39(2) PD 617, 619 (1985) (Isr.). This is contrary to the French legal system, for example, which includes the principle of double instance, according to which a litigant is entitled to have two courts decide his matter, including bringing testimonies a second time. A litigant is allowed to bring additional evidence on appeal without any limitation, provided that he does not go beyond the requested remedy. *See generally* SHLOMO LEVIN, THE THEORY OF CIVIL PROCEDURE, INTRODUCTION AND BASIC PRINCIPLES (1999).

8 It is important to emphasize that the right in itself to bring the matter before two courts is not something to be taken for granted. Thus, for example, in the American legal system not every judgment may be appealed. *See* Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 855 (1984). It is also the same in the Israeli legal system, in which, for example, a judgment in Small Claims Court is not subject to appeal except with permission. *See* Section 64 of the Law; Goldstein, *supra* note 6, at 485.

9 Regarding attachment of documents see Regulation 419 of the Regulations. Regarding attachment of an exhibits file see Regulation 437 of the Regulations.

pay a court fee in addition to the fee paid in the trial court.[10] Third, the appellant must provide a deposit that is intended to cover the costs of the respondents.[11] The amount of the deposit is not insignificant and certainly not restricted to the fixed limitations of the court fee.[12] Fourth, the law unfortunately does not establish a fixed time period for a judicial decision in the appeal, such as that which is determined in the trial court.[13] In addition, the time period in which an appeal will be heard by a judge after it has been filed is not determined at all.[14] A lack of such provisions simply means a long waiting period, sometimes several years, until a judicial decision is granted in the appeal. The appeal process has therefore become long, cumbersome, and expensive. For individuals choosing to appeal, some comfort can be found in the fact that the matter will be examined by a panel of three other judges, usually with greater experience and expertise.[15]

What happens if the court makes an error that is plainly visible? For example, an error in the identification number of the real estate, or in a case where he stated that he grants full relief to the plaintiff but in practice ruled a lower amount? Will the parties be required even then to go through the long procedure of an appeal in order to correct the clear error? Section 81 of The Courts Law, 5744 – 1984 (also referred to hereinafter as "the Law") provides:

> Error Correction in a Judgment
>
> 81 (a) When a court finds that an error was made in a judgment or in an interlocutory decision that it granted, it may within twenty-one days of the date of granting them, correct them in a decision detailing its reasons, and it may hear the arguments of the litigants. In this regard, "error" – error in

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10 In other countries, criticism was brought against the obligation of a litigant to pay court fees, arguing that they inappropriately block the right of access to the judicial system. *See* LEVIN, *supra* note 7, at 34. Even in the Israeli system this argument has been made more than once. *See, e.g.*, Goldstein, *supra* note 6, at 492.

11 *See* SUSSMAN, *supra* note 4, at 829.

12 Undoubtedly, the duty of the appellant to pay a deposit is more harmful to the right of access to the courts than the harm caused by the duty to pay the fee. The court recently considered the argument that the Minister of Justice exceeded his authorities when he determined the obligatory deposit. In denying the petition, the court indicated that the duty is not absolute, since Regulation 432 allows for exemption due to considerations of justice and creates an appropriate and proportional balance. *See* CivA 5208/06 Davis v. Malca, 3 Nevo Legal Database (June 29, 2006) (Isr.).

13 Regulation 190 (d) of the Regulations, *supra* note 1, sets forth: "The first court will grant its decision no later than thirty days after completion of the proceeding." The provisions relating to the times of the court sessions in the Supreme Court or the District Court as an appellate court do not determine fixed times but leave the issue to the discretion of the Chief Justice.

14 As an example of the present trial court ruling, see Regulation 151 of the Regulations.

15 According to a recent amendment to the law, appeals on Magistrates Court judgments given by a single judge in claims in amount or value that on the date of filing do not exceed 300,000 NIS, will be heard before one District Court judge. *See* Courts Law (Consolidated Version) (Amendment no. 52), 5768 – 2008, 2169 LSI 668 (2008) (Isr.).

> language, error in calculation, clerical error, inadvertent omission, random addition, etc.
>
> (b) Upon consent of the litigants, the court may decide at any time on any correction in the judgment or the interlocutory decision that it granted.
>
> (c) If a judgment or interlocutory decision is corrected as set forth in subsection (a), for the purposes of appeal the time of the decision regarding the correction will be seen as the time of granting the judgment or interlocutory decision.
>
> (d) A decision according to subsection (a) is not subject to appeal except in an appeal on the judgment or interlocutory decision.

Upon reading this provision, one immediately notices its very desirable basis: If the court finds an error in a judgment, it is able to correct it in a detailed decision, within twenty-one days. This simple procedure eliminates a cumbersome appeal process for the parties. It allows them (although within very narrow restrictions) to return to the same court and the same judge that gave the decision, without the necessity of attaching an exhibits file, paying a court fee or a deposit and most importantly – within a fixed time for granting a decision in the matter.[16] We noted that it is helpful to the parties, but no less importantly – it is helpful to the legal system. This procedure makes a panel of three judges unnecessary only for the purpose of considering a plainly visible error, avoids burdening the appellate courts,[17] makes the proceedings more efficient, and even contributes to the legal certainty and the finality of judgment within a short period of time.[18]

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16 Efficient use of this possibility strengthens the need for providing reasons in the decision. Otherwise, it will be difficult to identify a clerical error, and thus wrote Uri Straussman: "How will we know that indeed an error was made in the arbitrator's decision, if the entire decision is only one line, 'A will pay to B,' without reasoning from which one can understand and conclude the possibility of error?" Uri Straussman, *Reflections and Appeals on the Arbitrator's Decision*, 40 HAPRAKLIT L. REV. 227, 231 (1992).

17 *See* CivA 5187/91 Maksimov v. Maksimov, 190 Nevo Legal Database (June 22, 1993) (Isr.).

18 True, the parties to this procedure do not receive the inherent benefit of the appeal process – examination of the matter by another panel. True, viewing the matter through "other eyes" could reduce decisions with errors, and even if it does not reduce them, it will contribute to the legitimacy of the decision. As indicated by Resnik:

> While we are cognizant of human fallibility at all tiers and aware that repeated adjudications do not necessarily produce correct results, we nevertheless have created opportunities to review, if not to rectify, some of those mistakes. We draw some measure of comfort from having many actors, and sometimes specific kinds of decision makers (perhaps better paid or more carefully selected), participate in the decisionmaking process. The decisions thus gain legitimacy.

Resnik, *supra* note 8, at 869. In any event, since it is a matter of errors that are errors of language or only an inadvertent omission, the need to include additional players to the decision making system in order to strengthen its legitimacy is less essential.

B. The Scope of a Clerical Mistake

As stated, the procedure is an exceptional one and not a natural part of the system. Accordingly, it is limited by significantly narrow boundaries: The procedure does not cover every error and it does not "make improvements" to the judgment. This procedure is not intended to change the judgment but rather to return it to the original intention of the court. This path is therefore conditioned on an error that is technical in nature.[19] One of the outstanding cases that define the nature of the error is the case of *Yosifov*:

> This essentially concerns a technical omission resulting from distraction. It relates to something which the court wanted to include in its decision at the time it was granted, but that was unknowingly omitted from its attention. When bringing the question back to the attention of the court it becomes clear that the court was aware of the need to indicate one or another detail in its decision at the time that it was given. Yet the court did not do so due to one of the reasons listed above. . . . [The law] does not deal with mistakes resulting from forgetfulness that prevents the court from relating to one or another aspect of the dispute. Instead, it deals with the subjects of which the court was aware during the proceedings, but inadvertently overlooked when setting down its thoughts in writing. In conclusion, "[clerical mistake]" should be interpreted according to the technical meaning of this expression, its regular linguistic meaning without broadening its scope and allowing for corrections in the judgment, that are none other than a camouflage for writing a new judgment.[20]

It is therefore incumbent upon the court to correct a decision very carefully since in so doing it is violating the principle of finality of judgment.[21] In light of these approaches, one can understand the very limited extent to which the law provides for reopening a judicial decision.

C. Ways to Change a Decision Other Than by an Appeal

In order to complete the theoretical view, I will briefly discuss two additional paths that allow litigants to return to the same court, even after its work has been completed.

Clarification of a judgment: Section 12 of The Execution Law, 5726–1967, sets forth the following:

> 12. If the head of the Execution Office believes that a judgment or a portion of a judgment requires clarification for execution, he may submit a written motion to the court that issued it in order to receive clarification.

There are many similarities between this procedure and the procedure for error correction. For example, in both procedures the same court corrects the judgment after "Its work has been completed," and create new or additional time periods for filing

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19 *See* CivA 159/90 Solel Bone Ltd. v. Barak Or Ltd., 22 Nevo Legal Database (Aug. 16, 1993) (Isr.).

20 *See* CivA 769/77 Yosifov v. Yosifov, 670 Nevo Legal Database (May 23, 1978) (Isr.).

21 *See also* CivA 3197/98 Barzel v. Barzel, 388 Nevo Legal Database (July 10, 2001) (Isr.).

the appeal.[22] In contrast, there are also many differences between the procedures. For example, this procedure is intended only for the head of the Execution Office and not for the parties themselves. It is not limited in time and the possibilities for correction according to this procedure are broader, even including clarification that is not limited to a technical error.

A judgment that confirms an agreement as a court judgment: An additional way to challenge a decision, other than by appeal, is by returning to the same court that confirmed an agreement between the parties and granted it the validity of a judgment. Thus, the court states in the *Kam* case:

> Even when a judgment confirms an agreement, if it is proven that thereafter a substantive change in circumstances occurred, and it would be unjust to leave the judgment in place, it is possible to reopen the matter anew. . . . A judgment that is given on consent cannot be opened except in rare cases, due to its contractual nature. It certainly may be opened if the parties left an option for that. . . . But even if that was not the intent of the parties, the court is authorized to read such a condition into the agreement. . . . The basic approach is the balance between two interests, between the interest of finality and the interest of not leaving in place a judgment that has become completely unjust, due to a change of circumstances.[23]

This is the rationale for reopening an agreement that was confirmed in a judgment. But what is the procedure for cancelling a judgment? In the *Toledano* case, the court states that this procedure takes place in the same court that gave the decision, and not in a higher court.[24]

III. CORRECTION OF A CLERICAL MISTAKE

The procedure for correction of a clerical mistake raises a wide variety of problems. I will describe the legal situation in Section A of this Part. In Section B I will critique the procedure for error correction. The examination will show that the flaws inherent in this procedure can eliminate its benefits. In Part III, I will suggest solutions that could provide an appropriate response to these flaws.

A. Legal Description

Although the Law states, "When a court finds" and apparently limits the initiative for beginning the procedure only to the court, it is clear that the parties also may initiate it. If we were to limit the correction only to the initiative of the court, it is very likely that this provision of law would become useless. The court itself does not go back and look through decisions that it already granted to the parties, while other cases that need to be determined are pending before it. The correction procedure can, therefore, be opened both at the initiative of the parties and at the initiative of the court. It is not

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22 *See* CivA 3053/98 Gaadi v. Tzur Shamir Ins. Co., 937 Nevo Legal Database (Nov. 17, 1999) (Isr.) (holding that in the case of a motion for clarification, it is possible to file an appeal on the portion that was corrected within forty-five days from the day of correction).

23 *See* CivA 442/83 Kam v. Kam, 771 Nevo Legal Database (Apr. 15, 1984) (Isr.); HCJ 6103/93 Levi v. Supreme Rabbinical Court, 606 Nevo Legal Database (Sept. 4, 1994) (Isr.).

24 *See* CivA 116/82 Livnat v. Toledano, 732 Nevo Legal Database (July 15, 1985) (Isr.).

without reason that I focused on this issue, and in Section B of Part I will show that this interpretation, although reasonable and appropriate, creates a serious difficulty in the implementation of the procedure.

1. The Time Period for Filing a Motion – The Interpretation Developed by the Court

The legislature specifically set forth a time period of twenty-one days for correction of the decision. I believe that the provision of law which states, "it may, within twenty-one days from the date of granting them, correct them" could have been appropriate and correct if the initiative for the correction would have been solely in the hands of the court. However, since Section 81 of the Law relates both to the parties and to the court,[25] it is therefore inappropriate. The inclusion of the parties and the court within the same defined time period is problematic: If the parties file a motion for correction only on the twentieth day, is it possible to say that only one additional day remains for the court to grant a decision?[26] Would, therefore, the only way to correct the decision in such cases be by filing an appeal in the appellate court? If so, what benefit does the legislature provide with this legislation?

In the case of *Abu Hanni*, the Supreme Court attempted to solve the problem of the time period and thus interpreted, "In Section 81 it is set forth that a motion for error correction may be filed within 21 days from the date the decision is granted."[27] In other words, the time period determined in the provision applies only to filing the motion by the parties. This interpretation is inconsistent with the language of the provision, since the legislature limited the correction itself to twenty-one days from the time of granting the decision. If we argue that both submission of the motion and error correction are supposed to be completed within twenty-one days, then a problem arises in limiting both the court and the parties to a shared and common time period! Note that the parties and the court are not dependent upon one another and do not coordinate their timing. Their actions are chain reactions. When one is completed the other begins. It is certainly not joint activity that is supposed to take place simultaneously! The rationale of separation between the actions of the different players in the legal process accompanies us, as it should, throughout the entire civil procedure. It is unclear why the procedure under discussion did not follow this rationale.

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25 Such is also stated in CivA 29/83 Sahar Ins. Co. v. Kahanka, 39(4) PD 433, 436 (1985) (Isr.).

26 In this context it is stated in Kahanka:

> First, if the parties did not agree to the correction, the court may correct the error "within twenty-one days from the date of granting it to them"; in contrast to other matters that were regulated by the Regulations – for example in Regulation 247 of the Regulations – the law does not include a provision, that if a decision is given within 21 days from the day of filing a motion for correction it will be seen as if it was given on time.

Id. at 437.

27 *See* CivA 332/93 Abu Hanni v. State of Israel, Nevo Legal Database (Oct. 31, 1993) (Isr.).

Thus, the court found a creative way to overcome this inherent "flaw." In the *Kahanka* case, the Supreme Court ruled that if and when a motion for correction is decided upon after the fixed time period determined by law, the court must be lenient with the nature of the "special reason" required for an extension of time.[28] An additional Supreme Court ruling in the *Aspor* case understood this message, but took it even further and stated:

> The only real barrier before the respondents, therefore, is that the correction decision was given after the period of twenty-one days had passed. . . . Under the circumstances . . . this matter will also not be detrimental to the respondents . . . and by implication its decision should be viewed as a decision for extension of the time period.[29]

The Supreme Court determined in this way that the correction decision should be seen as a decision for the implied extension of time, even though the trial court itself did not indicate at all that it sees its decision as such.[30] Furthermore, in the *Yarhi* case, the Supreme Court continued to broaden this creative approach and ruled that, "The court has the authority to extend a time period at its initiative, even if it was not asked to do so in a special motion."[31]

Undoubtedly, these interpretations by the Supreme Court "preserved" the provision of the Law. Yet it is impossible to ignore the fact that these interpretations contradict the explicit language of the legislature. As such, they violate the rights of the opposing party and harm his expectations, at a time when he is entitled to rely upon the language of the law. Moreover, Regulation 528 of the Regulations sets forth clear conditions that only when fulfilled can the time period fixed by legislation be extended: "special circumstances," that "will be recorded" in the decision.[32]

In the *Aspor* case, the Supreme Court ruled that the decision of the trial court should be viewed as an "implied" decision for extension of the time period – without special circumstances, without recording them in the court record, and even without relating to the issue of an extension of time.[33] In later cases, the Supreme Court further

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[28] *See* CivA 29/83 Sahar Ins. Co. v. Kahanka, 39(4) PD 433, 436 (1985) (Isr.); CivA 1061/85 Ruvkin v. Klachek, Nevo Legal Database (Nov. 8, 1985) (Isr.) (finding advanced age and limited Hebrew understanding meet conditions for "special reason" to amend after 21-day limit).

[29] CivA 4308/00 Aspor v. Gubran Huri, Nevo Legal Database (Apr. 24, 2001) (Isr.).

[30] *Id.*

[31] CivA 441/88 Yarhi v. Goldgarber, Nevo Legal Database (Dec. 10, 1989) (Isr.).

[32] § 528, Civil Law Procedure Regulation, 5744–1984, KT 4685 2220, 2291 (Isr.), https://www.nevo.co.il/Law_word/law06/tak-4685.pdf [https://perma.cc/8QTF-U4YM]. The test for a "special circumstance" that was accepted by the court is a matter that is not under the control of a party. *See, e.g.*, HCJ 93/89 Mendelicht v. Maabadot Turbinol, Nevo Legal Database (May 8, 1989) (Isr.).

[33] CivA 4308/00 Aspor v. Gubran Huri, Nevo Legal Database (Apr. 24, 2001) (Isr.). While this Regulation is normatively set forth only in the Regulations, it includes within it an important value aside from the procedural interest itself. The requirement for special circumstances and for recording them, is like a requirement for a public court proceeding and represents the value

strengthened its creative interpretation. It again ruled that the fixed time period relates only to filing the motion for correction, and that the court itself is not limited in granting the decision. Thus, it states in the *Kubik* case:

> With respect to the time for granting the decision on a motion for correction, it is correct that Section 81(a) of the law states that when 'a court finds that an error was made in a judgment or in an interlocutory decision that it granted, it may, within twenty-one days correct them'. . . . However, in the literature, the opinion has been expressed that the provision relates to the time of filing the motion, and not to the time of the decision.[34]

The court refers to various sources, but their examination shows that they do not support this ruling. In the *Kubik* matter the court apparently had difficulty relying upon its own references that it brought, and continued to write as follows:

> In addition, the language of the provision does not determine what the law is when a decision is made after the period of 21 days has passed. Regarding provisions of this sort it has sometimes been determined that they are only "guiding provisions", that their lack of fulfillment does not usually negate the action that was taken, even if it deviated from the time period.

Is that indeed so?

A later Supreme Court decision referred to and cited the *Kubik* ruling as the "accepted ruling":

> According to the accepted ruling today, for the purpose of meeting the fixed time periods provided in Section 81 of the law, it is sufficient that the motion was filed within 21 days from the time that the judgment was given, and there is no significance to the question of when the court decision on the motion was actually given.[35]

In any event, despite the criticism and questioning of these creative rulings, my criticism of them is secondary. In section 2, below, I will raise issues of greater concern and argue that these creative rulings which were intended to revive the error correction procedure, in the end resulted in its failure.

2. How Can a Decision Granting the Motion be Appealed?

Section 81 of the Law also regulates the stage that follows the correction, and thus sets forth: "If a judgment was corrected as set forth in subsection (a), for the purposes of appeal the time of the decision regarding the correction will be seen as the time of granting the judgment."[36] Accordingly, if a judgment (hereinafter "the first decision") is corrected then the time of the correction decision (hereinafter "the second decision")

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of transparency according to which justice needs not only to be seen but also to be done. This requirement is intended, among other things, to strengthen the public trust in the legal system, a value that has recently been eroding.

34 CivA 7102/01 Kubik Ltd. v. Microsoft Corp., Nevo Legal Database (June 29, 2002) (Isr.).

35 CivA 4395/06 Amutat Z. P. v. Levi Avudut Afar, Nevo Legal Database (Jun 29, 2006) (Isr.).

36 § 81, The Courts Law, 5744–1984, LSI 38 271 (1983–84) (Isr.).

is regarded as the time of granting the judgment.[37] This means that the time period to appeal the first decision will be counted from the day of the correction decision, which is the second decision. The time period to appeal the first decision is frozen and moved forward to the time of the second decision. The number of days to appeal the entire judgment, including those portions that were not corrected, will begin from the day of the second decision.[38] This is actually a statutory extension for filing the appeal on the first decision.

What happens if a party wants to appeal only the second decision? A preliminary question that must be asked regards the nature of this decision – and whether it is perhaps a judgment with a right of appeal.[39] The well-known test that distinguishes between types of decisions is the technical test, which examines whether a proceeding has been closed and completed, or whether it is still in process.[40] This is the test that is also customary in the American legal system, known as the final judgment rule.[41] In the Israeli legal system, this formal rule replaced the substantive one.[42] However,

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37 It makes no difference what the correction may be, even a digit in the serial number of the judgment. *See* Amutat Z. P., *ibid*, at para 7: "Creation of a distinction between the different corrections could be detrimental to the legal certainty and encourage many proceedings regarding the application of Section 81(c) in any given instance. Considerations of efficiency support closing this gap and avoiding an additional focus of dispute between the parties on the subject of time periods." However it is unclear how this statement is understood together with another one expressed by the same judge in CA 881/06 Katz v. Gutlib (July 4, 2006) Nevo Legal Database (Isr.) (on file with author): "Similar to the idea contained within Section 81(c), above, there is no logic in justifying an extension of time when its ruling does not change anything significant whatsoever in the effective content of the judgment."

38 *See, e.g.*, CivA 8375/02 State of Israel v. Gedilan, Nevo Legal Database (Feb. 23, 2003) (Isr.). And it should not be taken lightly, since with respect to the clarification of a judgment according to section 12 of the Execution Law, 5727–1967, an appeal can be filed from the date of issuing the clarification (the second decision), but only with regard to the portions that were corrected. § 12, Execution Law, 5727–1967, LSI 12 (1966–67) (Isr.).

39 *See* CivA 328/67 Sharpski v. Sharpski, Nevo Legal Database (1968) (Isr.) for the distinction between "judgment" and "interlocutory decision."

40 *See* Goldstein, *supra* note 6, at 484. Goldstein also observed:

> In terms of appeal, as noted above, Israeli law recognizes a distinction between final judgments, which are generally appealable at the time of their entry, and "other decisions" which are appealable at the time of their rendering only if leave to appeal is granted by the appellate court. The courts have held that a final judgment for purposes of this rule is one that "closes the file" at the first instance, regardless of whether it does or does not preclude further litigation on the matter at issue.

Id.

41 Catlin v. United States, 324 U.S. 229, 233 (1945); *see also* J.H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 583 (2d ed. 1993) [hereinafter FRIEDENTHAL 2d]; Lauro Lines v. Chasser, 490 U.S. 495, 497–98 (1989).

42 *See* CivA 183/89 Kimhi v. Kimhi, Nevo Legal Database (June 25, 1989) (Isr.). "Since 1957 the test determining which decision is appealable by right and which is appealable by permission is not a test of determining the rights of the parties but the technical test of whether

with respect to decisions given after the judgment, the substantive test has remained, focusing on the question of whether the second decision was a determining decision for the judicial relief, or whether it only supported the relief already granted in the judgment. In other words, is the decision substantive to the judgment (and thus appealable by right), or is it actually unrelated to it (and therefore appealable only by permission)?[43]

A decision that confirms a correction changes the judgment, and as such is certainly not unrelated to the subject of the dispute: It must be seen as a "judgment,"[44] and therefore be appealable by right. Nevertheless, the legislature surprisingly determined that it is not at all possible to appeal such a decision, either by right or by permission. In order to illustrate this, we take for example the situation in which one of the parties is satisfied with the first decision (the judgment) or at least accepts it, and is not interested in appealing it at all. Afterwards, a decision is made to correct the first decision and the correction is to his detriment. If he wants to object only to the second decision, he has no alternative but to appeal the entire first decision in a complete appeal process, with all the procedural requirements involved.[45]

3. How Can a Decision Denying the Motion be Appealed?

An issue that is not dealt with at all in the provisions of Sections 81 (c) and (d) of the Law is the possibility of objecting to a decision denying the motion for correction. How can this decision be appealed? We found a response to this question in the case of *Abu Hanni*:

> Under Section 81(c) of the law the right of appeal exists only when the court decides to correct the judgment. The question of the right to appeal when the court denies the motion for correction remained for some time subject to further examination. . . . But – afterwards – the court ruled that there is no right to appeal in such a case: "It is explicitly stated in Section 81 (c) that the provisions of this section apply only if 'a judgment or other decision were corrected.'. . . A decision not to make a correction is not included. Whether good or bad, that is the written law and that is the desire of the legislature."[46]

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the proceedings in the case have been completed." *Id.*; *see also* CivA 226/61 Doron v. Zahobel, Nevo Legal Database (Sept. 21, 1962) (Isr.).

43 *See* CivA 7975/03 Hapoalim Bank v. Levi, Nevo Legal Database (Jan. 24, 2005) (Isr.). "[A] decision rejecting a request to cancel [an *ex parte* judgment], will be considered" an "interlocutory decision," even though the proceedings are finished and completed. CivA 34/89 Gelzer v. Gelzer, Nevo Legal Database (Mar. 23, 1989) (Isr.). From the substantive perspective it is a matter of "interlocutory decisions," that are decided by the trial court after the judgment has been given. *Id.* All these references lead to the conclusion that a decision which results in maintaining the judgment given at the end of the proceedings, without change, is "an interlocutory decision" and therefore requires permission for appeal. *Id.*

44 For example, a decision in a request for clarification according to Section 12 of the Execution Law, 5727-1967, is a judgment even though it was given after the determination of the case. § 12, Execution Law, 5727–1967, LSI 21 (1966–67) (Isr.).

45 *See supra* notes 8–14 and accompanying text.

46 CivA 332/93 Abu Hanni v. Israel, Nevo Legal Database (Oct. 31,1993) (Isr.).

Therefore, we have before us an unequivocal statement that an independent appeal cannot be brought on a decision denying a motion for correction. But more importantly, it is also impossible to appeal the denial itself by way of the appeal on the first decision. Although it is possible to appeal the judgment, it is an appeal on the judgment itself and not on the fact that the court was mistaken in denying the motion for error correction. These are two separate appeals. They may perhaps bring about the same result, but we cannot let that mislead us. Thus, for example, is an instance in which the court states in its decision on a motion for error correction that it indeed mistakenly omitted interest and linkage. However, the court also indicates that it does not allow itself to correct this omission because it is not, in its opinion, an "error" that is permissible to correct.[47] If it would be allowed to appeal the second decision within the appeal on the first decision (the judgment), then one could simply cite references showing that the failure to include interest and linkage is an "error." That would be sufficient to directly correct the judgment. However, since it is impossible to appeal it, the only choice is to appeal the judgment itself on grounds of the Adjudication of Interest and Linkage Law, 5721-1961, rather than on the grounds of an error.[48]

Moreover, unfortunately, the provision of subsection (c) relates only to the occurrence in which the first decision is corrected. When the decision is not corrected, the time for filing the appeal is not extended. Therefore, it is impossible to appeal the decision denying the motion for correction, either in an independent appeal or by way of the appeal on the judgment. In addition, the time for filing the appeal on the first decision is neither frozen nor counted from the day of the second decision. The time period begins from the day of the first decision.

B. "Error Correction in a Judgment" – Three Criticisms

In Section A of this Part, I examined the legal aspects of the procedure for filing a motion to correct a judgment. In the present Section, I will present my three criticisms of this procedure. In Part IV, I will offer a solution that I believe may be an appropriate response to this criticism.

1. Procedural Criticism

Although the parties can appeal a decision that confirms correction (the second decision), this possibility is unfortunately limited to and conditioned upon filing a full appeal on the judgment (the first decision). Is it not unnecessary to put the parties through the entire appeal procedure only for objecting to the decision that confirms a correction (the second decision)? Why not allow the parties to directly appeal only the second decision?

I will clarify my criticism with a concrete example. One of the instances in which a motion to correct an error is filed is when interest and linkage are omitted from the

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47 *Id.*

48 *See* CivA 4070/98 Zarfati v. Ovadia, Nevo Legal Database (Dec. 27, 1999) (Isr.). For further clarification of this distinction between appeal on a judgment and appeal on an interlocutory decision within it, see, for example, Canadian law. Under that legal system the appeal on an interlocutory decision always requires permission, even when it is incorporated in the appeal on the judgment. In other words, it is impossible to appeal an interlocutory decision by right, even though it is supposedly incorporated into the judgment. Garry D. Watson, *Finality and Civil Appeals–A Canadian Perspective*, L. & CONTEMP. PROBS. Summer 1984, at 1, 13.

judgment amount.[49] We assume that the defendant is obligated to pay a particular monetary amount, but that he decides to reconcile with the judgment and not to appeal it at all. In contrast, the plaintiff files a motion for error correction, requesting the addition of interest and linkage to the amount of the judgment. We assume that his motion is granted and the judgment amount increases – perhaps even significantly. The defendant then decides to change his original intention and files a motion to object to the decision. If not for the provision of Section 81 (d) of the Law, the defendant could have appealed only the second decision. The problem is that this provision does not allow him to do so. It forces him, instead, to file a full appeal on the first decision. Only within that broader appeal can he also object to the second decision. What is the theoretical rationale justifying this result? Which values of the civil procedure does this provision serve? Indeed, forcing a party through the full appeal procedure will incentivize him to also object to the judgment amount itself, and not only to the addition of interest and linkage. From the moment he is required to pay a full court fee and a deposit for the appeal, he won't be prevented from challenging the entire judgment.

However, it is also possible to see the situation from a different perspective based upon the approach of not encouraging independent appeal when a decision is not the central determination in the proceeding. Even in the 1950s, the Supreme Court commented negatively on the tendency to appeal every decision of the court.[50] The court further indicated that even if the parties have an argument that they deem appropriate, they do not have to hurry and appeal, and they must weigh whether it is possible to object to the decision within the appeal on the final judgment.[51] Concern over this tendency, that has proven to be correct over many years, brought the Justice Or Committee to suggest categorically disallowing appeals of interlocutory decisions, and permitting them only with respect to certain interlocutory decisions.[52]

In the American legal system as well, the traditional approach is not to allow the parties to appeal interlocutory decisions, except within the final judgment.[53] However, throughout the years several exceptions were created within American law in order to allow litigants to appeal interlocutory decisions. This was done only when the concern

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49 Such, for example, is determined in CivA 576/81 Ben Shimon v. Barda 39(2) PD 589, 590 (July 15, 1984) (Isr.) ("The question of linkage is thought about by every judge, and if he refrains from expressly indicating it, it is either an inadvertent omission or something that he believes is obvious."). *See also* CivA 1061/85 Ruvkin v. Klachek, 252 Nevo Legal Database (Nov. 8, 1985) (Isr.).

50 CivA 207/53 Tomshinski v. Kotlarski, Nevo Legal Database (Apr. 26, 1954) (Isr.).

51 *See, e.g.*, CivA 4037/91 Sultan v. Fima, Nevo Legal Database (Feb. 14, 1992) (Isr.).

52 *See* COMM. FOR EXAMINATION OF THE STRUCTURE OF THE REGULAR CTS. IN ISRAEL, REP. NO. 109-107 (1997). The list includes decisions characterized as impermeable or very influential on the continuation of the proceeding. On the remaining decisions it is possible to obtain permission to appeal only after the trial is completed. Some of these recommendations have been recently accepted in the Courts Order. Types of decisions that are not subject to permission for appeal. Regulations 5765 – 2009.

53 *See* FRIEDENTHAL 2d, *supra* note 41, at 583; Rosenblatt v. Am. Cyanamid Co., 86 S. Ct. 1 (1965). As we have seen in Canadian law, the approach is even stricter in this matter. *See* Watson, *supra* note 48 at 13.

was that not allowing an immediate appeal (without waiting to appeal the judgment) would cause a waste of judicial time.[54] In Israel, the Israeli legislature recently accepted this approach. Accordingly, permission for appeal is not granted, except when the court is convinced that if the appeal is not brought immediately, but only as part of a later appeal on the judgment, it will be detrimental to the parties.[55] This approach is supported by the idea that the examination of all the issues after the completion of the proceedings in the trial court gives the appellate court a broader perspective, prevents the sides from implementing tactics of delay and preserves the status of and trust in the trial court.

This approach that narrows the possibility of independently appealing interlocutory decisions was recently and further supported in Israeli law in the case of *Hader*. The court in *Hader* determined that a subject that was already appealed during a proceeding may be heard again during an appeal on the judgment.[56] For our purposes, even if it is possible to independently appeal the interlocutory decision on a motion for correction and the appeal would come before an appellate court, it would not prevent the parties from challenging the same interlocutory decision a second time as part of an appeal on the judgment.[57]

Contrary to the American system and the support it received in the *Hader* ruling, it seems that the approach of not allowing independent appeal of an interlocutory decision is primarily relevant with respect to decisions given during the proceedings, prior to the granting of a judgment. An independent appeal on those decisions could delay and prevent the continuity of the court proceedings. In contrast, a decision that confirms an error correction is given after the judgment, and the considerations regarding continuity of court sessions are less relevant. Therefore, with respect to a decision confirming error correction, there is reason to argue that the independent and separate appeal could eliminate the need for a full appeal. In light of the possibility to appeal, even indirectly, I use the term "procedural criticism." In the following section, I will discuss more substantive criticism.

2. Substantive Criticism

The provision of Section 81 of the Law, as interpreted in the case of *Abu Hani*, leaves no room for doubt: There is no way to appeal a decision denying a motion for correction, not even by appealing the judgment. The inability to appeal the denial of a motion for correction conflicts with the rules of law that allow, with permission, to appeal every interlocutory decision.[58] This interpretation by the Supreme Court in the

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54 *See* FRIEDENTHAL 2d, *supra* note 41, at 588 ("An early appeal also may be warranted if it would avoid further proceedings in the trial court."); *see also* Interlocutory Appeals Act, 28 U.S.C. § 1292(b) (providing for judicial discretion in interlocutory appeals).

55 The Courts Law (Amendment No. 52) 5765 – 2008, 2169 LSI, 668.

56 CivA 5834/03 Arye Ins. Co. v. Hader, Nevo Legal Database (Nov. 25, 2003) (Isr.).

57 Of course, provided the time of the appeal on the judgment has not yet expired or at least was extended in a separate motion.

58 Note especially that there is no differentiation in these sections as to whether the "interlocutory decision" was given before the judgment or afterwards. As the Supreme Court ruled in *Gelzer*, "[I]t is desirable to give Section 41 of the Courts Law a broad interpretation

case of Abu Hani is also problematic because of a well-known principle in the Israeli decisions that a judgment incorporates within it all the interlocutory decisions that were given during the proceeding. Within the appeal on the judgment, it is possible to appeal all of these decisions.[59] This principle also has a basis in American law:

> The aggrieved party may, therefore, await the final determination of case and upon appeal therefrom raise all questions involved in the case. . . . All interlocutory orders and decrees from which no appeal has been taken are merged in the final decree.[60]

Therefore, the ruling that a decision rejecting error correction cannot be subject to appeal is not simple at all. Even if we do not see the decision to deny the error correction as merging into the judgment, the right of appeal is set forth in Section 17 of the Basic Law: The Judiciary.[61] This gives the right of appeal constitutional status, so that its denial is apparently tainted with unconstitutionality.[62] Those who are of the opinion that the right of appeal is not a constitutional right still also give it extra normative weight.[63] They believe that the appeal process embodies a substantive value

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that will include the possibility of objecting to all the decisions of the court." CivA 34/89 Gelzer v. Gelzer, Nevo Legal Database (Mar. 23, 1989) (Isr.).

59 *See* CivA 90/476 Mitav v. Israel, Nevo Legal Database (Aug. 19, 1992) (Isr.).

60 Victor Talking Mach. Co. v. George, 105 F.2d 697, 699 (3d Cir. 1939).

61 § 17, Basic Law: The Judiciary, 5744–1984, LSI 38 101 (1983–84) (Isr.). In *Serboz*, Judge Levin wrote, "I have already heard of an 'interlocutory decision' that was given during the proceeding and merged into the judgment that is given afterwards; but I have not yet heard of the principle of retroactively merging interlocutory decisions that were given after the judgment." CivA 292/93 Serboz v. Ofek, Nevo Legal Database (May 8, 1994) (Isr.). In any event, the provision permitting appeal on the whole range of interlocutory decisions is set forth in Section 52(b) and in Section 41(b) of the Courts Law, but without any connection to the question of merging into the judgment. §§ 41(b), 52(b), The Courts Law, 5744–1984, LSI 38 271 (1983–84) (Isr.).

62 *See supra* note 49.

63 *See* HCJ 5580/98 Sofer v. Lab. Minister, Nevo Legal Database (Sept. 7, 2000) (Isr.). This is also the approach in the European continental legal systems in which the existence of the right of appeal (with respect to both criminal and civil matters) became one of the indications of fair legal proceedings and was even given constitutional standing. Mirjan Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 489–90 (1975). Thus, wrote Prof. M. Damaska:

> [C]riminal appeal in all modern continental systems implies a review not only of alleged legal error, but also of factual findings and even the punishment imposed. Nor is it surprising, in light of centuries of tradition, that appellate review gradually become associated with fairness in the administration of justice. Indeed, in modern continental countries, the 'right of appeal' is usually elevated to the constitutional level. The appellate process is made very inexpensive, and is not risky for the parties.

Id. at 490.

in law.[64] Therefore, any harm to it, if at all, should be very minimal.[65] The dominant approach in Israeli law is that the possibility of challenging court decisions is a substantive right,[66] but nevertheless not an absolute right.[67] Its very existence depends upon the explicit provisions of the law.[68]

3. Economic Criticism

I will argue that the procedure for error correction provided by law neither fulfills its purpose nor results in efficiency in the administration of judicial resources. It also

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64 For the right of appeal as a substantive right, see HCJ 85/87 Argub v. IDF Forces, 42(1) PD 353, 357 (1988) (Isr.).

65 Resnik, *supra* note 8, at 855, expanded in this way on the importance of the right of appeal in the American legal system, not only due to the possibility of changing the result, but also as an expression of other rights in the legal proceeding. Thus, she wrote:

> Revisionism: The importance placed on the ability to revise decisions comes from several sources: the hopes of correcting error; of altering outcomes based upon changed circumstances; of imbuing some decisions with more meaning by having them made repeatedly and sometimes by prestigious actors; of giving individuals a sense of having been fully and fairly heard. Thus, revisionism is related to outcome production but also serves other functions.

Id. For more on the role of the appeal as a means for correcting judicial errors, see Steven Shavell*, The Appeals Process as a Means of Error Corrections*, 24 J. LEGAL STUD. 379 (1995).

66 See the words of Chief Justice Shamgar in *Arguv*, HCJ 85/87 Argub v. IDF Forces, 42(1) PD 353, 361 (1988) (Isr.):

> The existence of the right of appeal has come to the level of an essential institution of great importance. Including it in the basic legislation expresses such recognition, because in order to ensure a fair and proper legal system, one must also ensure the implementation and existence of the right of appeal. . . . The existence of the right of appeal . . . strengthens the foundations of fairness and the likelihood that in the legal proceeding . . . a greater amount of justice is achieved. After all, the fine characteristics of the institution of appeal brought about the adoption of the appeal system as a substantive right.

67 There are also approaches that left the question of the standing of the right for further examination. *See* CrimA 11/99 Schwartz v. Israel, 54(2) PD 1, 41 (2000) (Isr.).

68 In addition, a comparison of the procedure for error correction with two other processes in the Israeli legal system increases the difficulty in understanding the denial of the right to appeal decisions that deny motions for error correction, even through an appeal on the final judgment. One process is the procedure in Small Claims Court. The rationale behind this institution is the creation of a speedy procedure, inexpensive and simple, for the benefit of the small consumer. An appeal on a final judgment is allowed only by permission. It is impossible to appeal interlocutory decisions during the proceedings, not even with permission. CivA 84/596 Kupat Holim v. Gal, 39(3) PD 477, 478 (1985) (Isr.). Nevertheless, it is possible to appeal an interlocutory decision within the appeal on the final judgment. An additional process in Israeli law is the criminal proceeding. There, too, it is impossible to appeal interlocutory decisions during the proceeding. However, here it is also possible to appeal interlocutory decisions as part of the appeal on the final judgment.

does not really eliminate the need of the parties to appeal the first decision. Due to an inherent flaw in the legal provisions, a party must concurrently and simultaneously file a motion for error correction and an appeal in the appellate court. I will explain further. The time period to appeal the first decision begins immediately upon the granting of the decision as does the time period to file a motion for correction. Therefore, the party faces two parallel paths for challenging the decision (appeal and motion for correction). If an appellant chooses only the motion for correction and it is denied, he would thus not be permitted to appeal the first decision, since the final time for filing it would have passed. True, if the motion for correction is accepted, the time period to appeal is frozen and moved forward so that it begins only from the day of the second decision. However, at the time the party files the motion for correction he does not know the outcome. As a precaution, he has to simultaneously file not only a motion for correction in the same court but also an appeal in the appellate court.

I will bring a practical example to illustrate my criticism. Let us assume that the plaintiff was awarded a monetary amount less than the remedy that he requested. Furthermore, the interest and linkage were omitted from this amount. The plaintiff reconciles himself to the outcome of the judgment but insists on the addition of interest and linkage to the amount that was awarded. Thus, the legislature offers him a simple way to do that by means of the procedure for error correction. Although the plaintiff acts accordingly, he does not know whether or not his motion will be granted. Since the time for filing the appeal begins running immediately with the first decision, he must also simultaneously begin the procedure of full appeal on the first decision. How then is the procedure for error correction helpful? In the end, it does not make it unnecessary to appeal in the higher court! Moreover, when the party has to file a full appeal, including the court fee and the deposit, nothing prevents him from raising objections to the entire judgment even though he did not anticipate doing so in the first place. Thus, somewhat absurdly, the procedure for the appeal that is filed only out of caution could develop into a substantial procedure! Even if the motion for error correction is granted later, and the interest and linkage are added will the appellant withdraw his appeal after he worked so hard on it and paid for it? Thus, the legislature incentivizes the party to conduct a full appeal that did not need to be submitted in the first place.

It is possible to argue that the error correction procedure will be exhausted within twenty-one days, and afterwards the parties will have sufficient time to decide whether or not to file an appeal (in light of the fact that the time period for appeal is forty-five days from the day of the first decision, and only twenty-one days were deducted from them). My response to that is that the *Kahanka* decision and the later rulings that followed it[69] made the number of days for the correction procedure more flexible and allowed the courts to also decide on a motion for error correction after twenty-one days. However, de facto, the time periods are not sequenced but concurrent, and the party that files the motion for correction has no choice but to also file an appeal in the higher court.

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69 *See* CivA 4308/00 Aspor v. Gubran Huri, Nevo Legal Database (Apr. 24, 2001) (Isr.); CivA 7102/01 Kubik Ltd. v. Microsoft Corp., 3 Nevo Legal Database (June 29, 2002) (Isr.); CivA (DC Jer) 4395/06 Amutat Z. P. v. Levi Avudut Afar, 2 Nevo Legal Database (June 29, 2006) (Isr.).

As stated above, although in the case of *Kahanka* the Supreme Court revived Section 81 of the Law through constructive interpretation, it did not consider that such interpretation would paradoxically be detrimental to the provision.

Therefore, the party that files a motion for error correction is required as a precaution to also implement one of the two following procedures: The first is an appeal in the appellate court. In this appeal the party may include not only the issue for correction but also additional issues. The court fee for filing the appeal is fixed and is not dependent upon the number of issues it includes. Therefore, the party unfortunately has no incentive not to include all the possible arguments for objecting to the first decision. The second procedure is a motion for an extension of time to appeal.[70] This motion and the appeal itself are filed in the higher court and involve a substantial amount of unnecessary effort.

Needless to say, initiating a double procedure only as a precaution creates significant difficulty for every legal system. The system is occupied with an additional procedure including filing, case distribution, fees, a deposit, and more. The rules of civil procedure are supposed to be simple and clear so that they will be successful in their tasks of lessening costs in the legal proceeding and completing them as quickly as possible. Professor Judith Resnik explains:

> Economy: A tenth procedural feature, in tension with revisionism and in tandem with finality, is that the system produces results with the least expenditure of dollars, energy, and time possible. Economy is that part of efficiency that relates to resource conservation and to the view that a functional system must produce results speedily and with minimal cost. Economy is used here in the narrow sense of low direct costs.[71]

The error correction procedure fails to implement all the values stated here, as well as the economic feature of civil procedure.

IV. A SUGGESTED SOLUTION – REGULATION 398(A)

I will offer a solution to the difficulties mentioned above. For that purpose, I recommend adopting principles from a similar legal procedure: the motion for cancellation of an *ex parte* decision.

A. First Principle: "Freezing" the Time Period

Regulation 201 of the Regulations sets forth:

> If a decision is given ex parte or without pleadings from the other party, and the party against whom the decision was given filed a motion for cancellation within thirty days from the day that the decision was delivered to him, the court that granted the decision – may cancel it.

The *ex parte* decision may be appealed before the appellate court. Regulation 201 allows for an additional and simpler channel for objecting to the decision: the party "against whom the decision was given" may file a motion in the same court for

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70 The same also happened in the matter of HCJ 6103/93 Levi v. Supreme Rabbinical Court, 214 Nevo Legal Database (Sept. 4, 1994) (Isr.) ("The appellant filed an appeal out of caution and included within it the subject of the motion for correction.").

71 Resnik, *supra* note 8, at 857.

cancellation of the decision. This procedure allows for the same court that gave the decision to correct it, and in that way avoids the need for the parties and the legal system to conduct unnecessary proceedings in the appellate court.[72]

A detailed examination of the procedure for a motion for cancellation reveals similarities with the procedure discussed in this Article. In both of the procedures, one may file a motion in the court that granted the decision, even though its work has been completed. Both procedures are initiated in this way, without detail of the entire matter before a different court, without attaching documents, and without payment of an additional fee. Both proceedings are limited to a fixed number of days.

In the past, the number of days to file an appeal on the first decision began running concurrently with the number of days to file a motion to cancel the same decision. This simultaneous calculation of days forced the party to file at the same time both a motion in the same court and an appeal in the higher court. The issue is described in the *Yerushalbit* case:

> The time periods for filing an appeal and for filing a motion for cancellation ran concurrently, from the day of the first decision. While an appeal may be filed within 45 days, a motion for cancellation may be filed within 30 days. Sometimes the parties have simultaneously filed both the motion for cancellation and the appeal in order not to miss the fixed time periods. The courts did not look upon that favorably, even though the rulings allowed it.[73]

The legislature decided to enact Regulation 398A of the Regulations.[74]

> 398A.(a) The time to appeal or to request permission to appeal a decision given ex parte or without pleadings from the other party (in this regulation – the first decision) with respect to which a motion was filed for cancellation, will be counted from the day the decision is granted on the motion for cancellation (in this regulation – the second decision).

The legislature actually "froze" the time period for appeal on the first decision so that it begins only from the day of granting the second decision. Accordingly, a party that files a motion for cancellation does not have to be concerned that the time period for appeal could pass before a decision is made on his motion. He can be certain that the time period for filing an appeal on the first decision will begin only from the day of the second decision (the decision on the motion for cancellation), even if it will be given after several months. Thus, the "resourcefulness" of the legislature in the procedure for cancellation created the possibility of taking two paths for objection, one after another, without having to simultaneously tend to them both.

The problem is that while the procedure for cancellation was repaired, the procedure for correction remained problematic. I suggest implementing the same solution in the motion for correction. It is impossible to ignore the concern that if my suggestion would be accepted and the time for filing an appeal be frozen until the decision on the motion for correction, then the procedure for error correction could be

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72 SUSSMAN, *supra* note 4, at 727.

73 *See* CivA 296/96 Yerushalbit Ins. Agency v. Peltours Ins. Agencies, 49(5) PD 876, 878 (1996) (Isr.).

74 Civil Law Procedure Regulations (Amendment No. 2), 5756-1995, KT 5683 1490 (Isr.).

misused by receiving "an extension of time" for appeal. Even if a motion for error correction is meaningless and without any basis, it will cause the time for filing an appeal to be counted from the day of the decision on the motion for correction, and in that way an extension of time will be achieved. The courts can reduce this misuse if they require the significant payment costs when it becomes clear that the motion is meaningless. Additionally, the benefit of my suggestion is still greater than its disadvantage.

B. Second Principle: The Right of Independent Appeal

When a motion is filed for cancellation of an *ex parte* decision, a litigant may separately appeal the decision on the motion. The regulations determine not only that the time period to appeal the first decision begins from the day of the second decision, but also that the second decision may be independently appealed. It is clearly impossible to ignore the distinction in principle between the procedure for filing a motion for cancellation and the procedure for filing a motion for error correction. The motion for cancellation deals with the situation in which a decision was given without pleadings or without the presence of one of the parties. The legal system is not comfortable with these decisions, because an individual did not have his day in court and because the right of access to courts (that was recognized as a constitutional right) is violated. Therefore, one may assume that the legislature tended to broaden the possibilities of objection, and allowed objection not only to the first decision, that was given *ex parte*, but also independent objection to the decision on the motion for cancellation. In contrast, the procedure that preceded the motion for error correction took place as usual, both parties participated in it, and neither party's right of access to the courts was violated. In any event, I believe that adopting a procedure to independently appeal the second decision in the correction proceeding could allow the judicial system and the parties to avoid a full appeal that is initiated only as a precaution.[75]

To summarize sections 1 and 2, in my opinion it is appropriate to adopt two major principles from the procedure for motion for cancellation. The first is freezing the time period for filing an appeal on the initial decision. The second, which is not necessarily dependent upon the first, is providing the right of independent appeal on the second decision.

C. Third Principle: Return to the Express Language of the Law

Thus, the interpretation that exacerbated the problem began with the case of *Kahanka* and the decisions that followed it, resulting in completely ignoring the fixed number of days in the Law. These rulings prevented a sequenced calculation of days. If the Supreme Court will change these rulings and adhere to the express language of Section 81, then there may be no need to appeal the first decision. Section 81 clearly states that the court "may, within twenty-one days from the day of granting them, correct them." The entire procedure will be completed within twenty-one days, and additional time will remain to appeal the first decision. However, the problem remains as to the time period shared by the parties and the court for implementing the procedure. It may be suggested that the court determine by interpretation that the

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75 A similar possibility that also supports my argument is objection to the denial of a motion for clarification under section 12 of the Execution Law.

parties may file a motion within less than the twenty-one days, so that only the remaining time will be available to the court for correction of the decision. In other words, the court will grant a decision within the period of twenty-one days.

I doubt how legitimate this interpretation is since it is not directly apparent from the language of the law. However, it seems preferable to the existing interpretation that is not at all supported by the language of the law. Moreover, even if the Supreme Court interprets the section as suggested and the motion is indeed filed within a shorter number of days than determined by the provision, who will ensure that the court completes its work in the time remaining? The second problem, with respect to the denial of the right to appeal the second decision, certainly cannot be resolved through court rulings, since there is no right of appeal unless provided by law. Therefore, unfortunately, it is very doubtful that there is reason to refer the issue to the Supreme Court.

Therefore, I will examine the adoption of my suggestion by the legislature. I suggest two approaches: The first is broadening the language of Regulation 398A and also applying it to a motion for correction. This will be the language of Regulation 398A:

> 398A(a) The time to appeal an ex parte decision, a decision given without pleadings from the other party, or a decision for which a motion for error correction was filed (in this regulation – the first decision), with respect to which a motion was also filed for cancellation according to Regulation 201 or for error correction according to Section 81 of The Courts Law (respectively), will begin from the day the decision is granted in the motion for cancellation or the motion for correction (in this regulation – the second decision).

The second approach is enacting a new regulation, similar to Regulation 398A, as follows:

> 398B. The time to appeal or to request permission to appeal a decision with respect to which a motion for correction was filed according to Section 81 of The Courts Law, (in this regulation – the first decision), will be counted from the day the decision is granted in the motion for correction (in this regulation – the second decision).[76]

That will eliminate unnecessarily implementing two parallel paths of objection at the same time, including all the negative consequences it involves.

V. CORRECTION OF CLERICAL MISTAKE IN AMERICAN LAW

A. Error Correction

In the American legal system, the Federal Rules of Civil Procedure determine the process of error correction after the granting of a decision. Rule 60 authorizes the courts to correct clerical errors, oversights, etc. This correction can be made both by the initiative of the parties and also by the initiative of the court. It sets forth as follows:

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76 The Regulations, *supra* note 1.

> Rule 60. Relief from a Judgment or Order
>
> (a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.[77]

This procedure does not require reopening the decision from the beginning and conducting a substantive proceeding. Therefore, it is considered a "ministerial procedure," even though it may sometimes be beneficial to one of the litigants by altering an erroneous decision. There is no time limitation for filing a motion for correction under this procedure.[78] Thus writes J.H. Friedenthal in his book:

> Although corrections may relieve a party from an erroneous judgment, it is a ministerial procedure and does not require the judgment to be formally reopened. . . . Thus, it is not very controversial. In fact, in most systems the ability to correct a judgment for clerical mistakes exists at any time.[79]

This procedure has indeed been included in the state legal systems in most of the United States,[80] as well as in additional countries.[81]

In contrast, more substantive corrections that are not "technical corrections" are addressed in Rule 59 of the Federal Rules of Civil Procedure, which provides that motions for change or correction of a decision must be filed within a limited time period of 28 days. It provides as follows:

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77 FED. R. CIV. P. 60(a). The final section of the rule determines that if an appeal was filed in the higher court, its permission must be requested before the lower court will correct the clerical error. In the Israeli legal system, there is no reference to this situation, perhaps in light of the fact that the Israeli legislature set a limited time for requesting and making a correction (21 days), and he assumed that no conflict would be created between the courts. In contrast, in the American legal system there is no limitation to the time in which one may file a request for clerical error correction. Therefore, there could be a conflict, and perhaps that is the reason for this final section.

78 Tillman v. Tillman, 172 F.2d 270, 274 (D.C. Cir. 1948) ("[A] clerical mistake in the judgment arising from oversight or omission may be corrected by the court at any time, as Rule 60 provides. . . .").

79 JACK. H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 589 (3d ed. 1999) [hereinafter: FRIEDENTHAL 3d].

80 *See e.g.*, MASS. R. CIV. P. 60(b) (1974); TENN. R. CIV. P. 60.01 (2008); CAL. CODE CIV. P. 473(d) (2008).

81 For example, in Australia the rule is called "slip rule" and it states as follows: "If there is a clerical mistake, or an error arising from an accidental slip or omission, in a judgment or order, or in a certificate, the court, on the application of any party or of its own motion, may, at any time correct the mistake or error." *Uniform Civil Procedure Rules* 2005 (NSW) r. 36.17 ; *see also Burrell v The Queen* [2008] HCA 34 (Austl.); *Amorin Constructions Pty Ltd v Kamtech Electrical Servs Pty Ltd* [2008] NSWSC 285 (Austl.).

> Rule 59. New Trial; Altering or Amending a Judgment . . .
>
> (e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.[82]

Thus, the motion to correct a clerical error that is a technical correction may be filed at any time. In contrast, the motion to correct a substantive error must be filed within only twenty-eight days.[83] Naturally, American judicial decisions examine whether a correction is considered a clerical correction that is covered by Rule 60,[84] or whether it is considered a substantive correction that is covered by Rule 59.[85] For example, the court determined that a motion to correct a decision that requires additional evidence cannot be considered a clerical error.[86] The same applies to motions involving additional payment such as attorney's fees[87] and a motion to decrease punitive damages.[88] In such matters the correction is more substantive and therefore will be subject to the conditions of Rule 59 of the Federal Rules of Civil Procedure.

B. Freezing the Time Period for Filing an Appeal

This Article focuses primarily on freezing the time period for filing an appeal when a motion is filed for correction of a clerical error. Rule 4 of the Federal Rules of

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82 FED. R. CIV. P. 59(e).

83 *See also* Jackson v. Fick, No. 2:06CV00007, 2007 U.S. Dist. LEXIS 585827, at *4 (E.D. Mo. Aug. 10, 2007) ("Federal Rule of Civil Procedure 59 permits a party to file a motion to alter or amend the judgment within ten (10) days of the entry of judgment. Rule 60 similarly provides for relief from Judgment or Order, however, upon more limited grounds. A party may seek relief from a judgment or order for clerical mistakes under 60(a), or for: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, (6) any other reason justifying relief from the operation of the judgment, under 60(b). Fed. R. Civ. P. 60(a)-(b). Rule 60 does not contain a time limitation."). Rule 59 was changed in 2008 from 10 days to 28 days. *Jackson v. Fick* was decided in 2007, before this change.

84 Truskoski v. ESPN, 60 F.3d 74, 77 (2d Cir. 1995); Paddington Partners v. Bouchard, 34 F.3d 1132, 1140 (2d Cir. 1994) ("To be correctable under Rule 60(a), the [alleged error] in a judgment must fail to reflect the actual intention of the court[].); Dudley v. Penn-Am. Ins. Co., 313 F.3d 662, 665 (2d Cir. 2002) ("We hold that the district court correctly construed Dudley's motion as one made pursuant to Rule 60(a). The Amended Judgment did not affect substantive rights. It merely corrected a judicial oversight, namely the district court's failure to include the monetary award in the Original Judgment.").

85 Such, for example, omission of interest from the day the judgment is granted and thereafter could be corrected in the procedure for correction of a clerical error but interest up until the time of the decision cannot be corrected with this procedure because the calculation requires additional findings. *See* Emp. Mut. Cas. Co. v. Key Pharm., Inc., 886 F. Supp. 360, 363 (S.D.N.Y. 1995).

86 McNickle v. Bankers Life & Cas. Co., 888 F.2d 678, 682 (10th Cir. 1989).

87 White v. N.H. Dep't of Emp. Sec., 455 U.S. 445, 452 (1982).

88 Dow v. Baird, 389 F.2d 882, 884 (10th Cir. 1968).

Appellate Procedure addresses the general time requirements for filing an appeal and determines that the time for filing a notice of appeal on each decision is thirty days:

> Rule 4. Appeal as of Right – When Taken (a) Appeal in a Civil Case.
>
> Time for Filing a Notice of Appeal. (A) In a civil case . . . [an appeal] must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.[89]

The continuation of this rule details various motions, that upon their filing in the first court, the time for filing an appeal is statutorily extended. The time for filing an appeal begins only from the day of the decision on the motion. I refer to this as "freezing" the time period for filing an appeal, so that it begins from the day of the second decision. It is interesting to note that a motion to correct a clerical error is included at the end of this list. The rule sets forth as follows:

> (4) Effect of a Motion on a Notice of Appeal.
>
> (A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:
>
> . . . .
>
> (iv) to alter or amend the judgment under Rule 59;
>
> (v) for a new trial under Rule 59; or
>
> (vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.[90]

Thus, the American legal system, as opposed to the Israeli legal system, determines in its Federal Rules that filing a motion for clerical error correction, as well as filing additional motions, "freezes" the time period for filing an appeal. The time to appeal begins to run only from the day of the decision on the last motion, whether the motion is granted or denied. However, here the system limits the time for filing the motion to only ten days. In other words, even though it is possible at any time to file a motion for correction of a clerical error, a condition for extending the time to file an appeal so that it begins from the day of the second decision is that the motion be filed within ten days of the first decision. If the motion is not filed within that time period, the time for filing an appeal begins from the day the first decision is granted and is not extended.[91]

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89 FED. R. APP. P. 4(a).

90 *Id.*

91 Mark R. Kravitz & Daniel J. Klau, *Developments in the Second Circuit: 2000-2001*, 34 CONN. L. REV. 833, 949–50 (2002) ("According to Rule 4(a)(1) of the Federal Rules of Appellate Procedure, a private civil litigant must file a notice of appeal within thirty days after entry of the order from which he is appealing. However, Rule 4(a)(4)(A) tolls the commencement of this thirty-day period until after disposition of certain post-judgment motions, including Federal Rule 59(e) motions to alter or amend the judgment, provided that those motions are timely filed. A Federal Rule 59(e) motion is 'timely filed' only if it is filed

Very important for our discussion is the fact that up until 1993, Rule 4 of the Federal Rules of Appellate Procedure did not include a motion for correction of a clerical mistake. When such a motion was filed, the time for filing an appeal was not extended and the number of days did not begin from the second decision. In contrast, a motion for a substantive correction under Rule 59 was included in Rule 4, and the time for filing an appeal was extended when it was filed. The similarity between a motion for a substantive correction and a motion for correction of a clerical error created confusion among the litigants and the courts in the United States. It was not clear enough when a motion for correction of a judgment extended the time to file an appeal, and when it did not. Thus, the court describes in the *Dudley* case:

> Prior to 1993, Rule 4(a)(4)(A) did not include motions under Rule 60 in its list of motions that served to reset the running of the time for filing notice of appeal; just as they are today, however, motions to alter or amend a judgment under Rule 59(e) were included. Because of the similarities between motions under Rule 59(e) and Rule 60(b) – i.e., both motions seek a substantive change in the judgment – a difficulty arose in determining whether substantive objections to a judgment were motions under Rule 59(e), which reset the appeals clock, or motions under Rule 60(b), which did not.[92]

This confusion caused the courts to determine whether or not the motion extends the time according to the test of the time that the motion was filed. As long as the motion was filed within the twenty-eight-day period, as contemplated in Rule 60, they saw it as extending the time. In contrast, a motion that was filed after this time period did not extend the time to file an appeal. In 1993, a motion for correction of a clerical error was added to Rule 4 of the Federal Rules of Appellate Procedure. With that addition, the Advisory Committee indicated the time period of ten days, as was customary practice in the courts, as the determining time period for all kinds of motions. If the motion, including a motion for clerical error correction, is filed within ten days then the time for filing an appeal is extended. The court explained further in the *Dudley* case:

> Most circuits, including this one, resolved this difficulty by adopting a bright-line rule: Any substantive attack on a judgment that was filed within ten days of entry would be treated as a Rule 59(e) motion for purposes of Rule 4. . . . When Rule 4(a)(4)(A)(vi), adding "motions for relief under Rule 60" to the list of tolling motions, was adopted in 1993, the Advisory Committee specifically stated that the amendment "comports with the practice in several circuits of treating all motions to alter or amend judgments that are made

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within ten days of entry of the judgment from which the movant seeks relief. Therefore, because the defendants did not file their reconsideration motion within ten days of the district court's original order, their reconsideration motion did not serve to toll the thirty-day period to file a notice of appeal, which began to run immediately after the district court entered its original order, rendering the defendants' notice of appeal untimely.").

92 Dudley v. Penn-Am. Ins. Co., 313 F.3d 662, 675 (2d Cir. 2002); Friedenthal 3d, *supra* note 79, at 588: "The filing of post trial motions does not extend the time for filing an appeal. Fed. App. Proc. Rule 4(a) lists the motions that do extend the time for an appeal and does not include motions under Rules 59 and 60."

> within 10 days after entry of judgment as Rule 59(e) motions for purposes of Rule 4(a)(4).[93]

The purpose of the amendment to Rule 4 and the addition of the motion to correct a clerical error was therefore to resolve the confusion arising from the similarity between motions for correction under Rule 59 (that resulted in the extension of time) and motions for correction under Rule 60, including correction of clerical errors (that did not result in the extension of time to file an appeal). In the *Larson-Jackson* case, the court explained:

> The notes of the advisory committee on the amendment to Rule 4 indicate that this provision was included to resolve matters similar to the one at issue. The subsection was added to "eliminate[] the difficulty of determining whether a posttrial motion made within 10 days after entry of a judgment is a Rule 59(e) motion, which tolls the time for filing an appeal, or a Rule 60 motion, which historically has not tolled the time." Fed. R. App. P. 4 advisory committee's note (1993).[94]

C. Criticism on the Extension of Time for Filing an Appeal

Interestingly, the minority opinion in the *Dudley* case argues that the intention of Rule 4 of the Appellate Rules was not to cover technical clerical errors (which are included in Rule 60(a) of the Rules of Procedure), but only more substantive errors, included in Rule 60(b) of those rules. According to this opinion, the determination of the time for filing the appeal immediately with the granting of the original decision in the lower court serves an important value, which is the finality of the litigation and speedy dispute resolution. Disputes are supposed to be resolved within a defined and fixed period of time, and the extension of time for filing an appeal is detrimental to those values. This opinion further indicates that according to the language of Rule 60(a), a motion to correct a clerical error includes both the correction of other decisions and the correction of the court record. If that is so, then the majority opinion, by determining that Rule 4 from now on also includes correction of clerical errors under Rule 60(a), actually provides one of the parties with a tool for delaying the time to file an appeal and suspending it with meaningless and minor motions (such as motions to correct the record, for example). These sorts of motions certainly do not serve the interest of a speedy and efficient conclusion of the dispute. Therefore, contrary to the majority opinion and despite the clear language of Rule 4 after its 1993 amendment, the minority opinion believes that this rule should not include motions for correction of a clerical error. The minority opinion in the *Dudley* case states:

> There is absolutely no indication that the committee intended to extend the list of tolling motions to include ones for nonsubstantive or clerical corrections under Rule 60(a), which had never theretofore had such effect. . . . The rationale of such a rule is that appellate time limits serve a strong interest in finality and swift resolution of cases and should begin to run whenever the lower court has actually and finally disposed of the case . . . Second, it must be noted that Rule 60(a) allows corrections to be made not

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93 *Dudley*, 313 F.3d at 675–76. The current version of Rule 59 of the Federal Rules of Civil Procedure is 28 days and not ten days, as it was until 2008.

94 Internet Fin. Servs., LLC v. Law Firm of Larson-Jackson, P.C., 394 F. Supp. 2d 1, 5 (D.D.C. 2005).

> merely to judgments, but to "orders or other parts of the record" as well. The majority's holding – that all motions under Rule 60, if filed within ten days, serve to reset the appeals clock – necessarily therefore includes motions that are not even directed at the judgment on appeal . . . I fear, therefore, that the majority's holding has significant potential for mischief in the hands of litigants who, for whatever reason, seek to delay appellate review by filing various Rule 60(a) motions to correct the record—motions which may not be frivolous but certainly do nothing to serve the interests of swift resolution of cases.[95]

The literature also brings similar criticism of the extension of time to file an appeal. It argues that this extension could result in one party who had thirty days available to file an appeal, actually filing it only after a few years. The time period to file the appeal begins to run only on the day of the decision on the last of the motions. Philip Pucillo writes:

> Under Rule 4(a)(4)(A) of the Federal Rules of Appellate Procedure, the effect of the timely filing of certain designated postjudgment motions under the Federal Rules of Civil Procedure – including a motion for judgment under Rule 50(b), a motion to amend or make additional factual findings under Rule 52(b), a motion to alter or amend the judgment under Rule 59, or a motion for a new trial under Rule 59 – will be that the time to appeal from the underlying judgment "runs for all parties from the entry of the order disposing of the last such remaining motion." As a result, a party who initially had just thirty days to file a notice of appeal from the judgment might nevertheless file a timely notice from that judgment several years after its entry if the district court takes that long to decide the pertinent motion (or motions).[96]

The solution that somewhat reduces this concern is the emphasis on the limitation in Rule 6(b) of the Federal Rules of Procedure. The lower court does not have the authority to extend the time to file the aforesaid motions beyond the time determined by the rules. Thus, it is stated:

> Notably, Rule 6(b)'s restriction on extensions of time presently encompasses not only Rule 59 motions, but also motions for judgment under Rule 50(b), and motions to alter or amend findings of fact under Rule 52(b). In light of Robinson, therefore, a district court would have no jurisdiction to entertain any such motion that was filed out of time . . . rather than being prescribed in a congressional statute, the timing restrictions in question are established by the Supreme Court through the Federal Rules of Civil Procedure. And those

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95 *Dudley*, 313 F.3d at 676.

96 Philip A. Pucillo, *Jurisdictional Prescriptions, Nonjurisdictional Processing Rules, and Federal Appellate Practice: The Implications of Kontrick, Eberhart & Bowles*, 59 RUTGERS L. REV. 847, 871 (2007).

> Rules . . . , establish a set period of time in which the motion must be filed, and forbid an extension of time for any reason not provided for in the rule.[97]

This can lessen the possible damage from filing motions and the resulting extensions of time to appeal.

D. The Appeal of the Second Decision

The second issue in this Article addresses the possibility of an independent and separate appeal of the decision on the motion to correct an error, the second decision. Rule 4 of the Federal Rules of Appellate Procedure further determines that objection to the second decision, whether or not the motion will be granted, does not continue to extend the time to file an appeal on the first decision – the original one – and that the appeal on the first decision should be filed immediately upon the granting of the second decision:

> (B) . . . (ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal –in compliance with Rule 3(c) –within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.[98]

This implies that one may file an appeal on the second decision, by itself.

Thus, the American legal system allows the court to correct clerical errors, whether by its own initiative or by that of the parties. Filing a motion for correction is not limited in time, nor is the correction itself, in contrast to the Israeli legal system that limits the actual correction to a period of twenty-one days. The American legal system extends the period for filing an appeal, so that it begins from the day of the decision on the motion for correction. In other words, it begins from the day of the second decision, provided that the motion for correction is filed within ten days. Therefore, from the time that a party files a motion for correction, he is not required to concurrently file a notice of appeal. This time is statutorily frozen for him. This differs from the Israeli system, which extends the time to file an appeal only when the motion for correction is granted and not when it is denied. This could result in simultaneously filing an appeal with a motion for correction, or at least a request for an extension of time. In addition, under the American system one may file an independent appeal on the second decision, even if it is not a part of the judgment. In contrast, the Israeli system allows only for its appeal by way of the original appeal, provided that the motion for correction is granted.

VI. CONCLUSION

This Article investigates the development, usefulness, and efficiency of the procedure for error correction, set forth in Section 81 of the Law. The advantage of this procedure is clear: The legislature offers the parties a simple and short way to change a decision that includes a clerical error. This procedure may undoubtedly

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97 *Id.* at 872–73.

98 FED. R. APP. P. 4(a)(4)(B).

eliminate the need for the parties to file an appeal, and it will expedite the conclusion of the decision while it is still before the trial court, without having to appeal in the appellate court. The difficulty that arises is that the procedure suffers from three serious and inherent shortcomings, which could hinder its objective and purpose. They briefly are as follows: First, Section 81 of the Law provides the same time period for the parties and the court to initiate the correction procedure and to correct the decision. There is no similar determination in all the regulations of civil procedure. Second, the provision does not allow independent appeal of the decision on the motion for correction, no matter its result. Third, the procedure for error correction has no mechanism that "freezes" the time period to file an appeal on the first decision. This creates a parallel race in time between two paths for objection to a court decision and forces the parties to simultaneously take part in two procedures, a motion for error correction and if only as a precaution, an appeal. I argue in this Article and illustrate through practical examples that these shortcomings overshadow the benefits of the procedure until it becomes meaningless.

The Supreme Court decisions addressed only with the first shortcoming. Through creative interpretation the court tried to overcome the failure resulting from the shared time period: Rulings that adopted judicial restraint were interpreted so that the court can give a decision even after the time period, and that its decision extends the time period "by implication." Other judicial panels even went further in their rulings and disregarded the language of the legislature. Some of them determined that it is only a "guiding principle," and others determined that the fixed time period in Section 81 of the Law relates only to the parties themselves. Both approaches increase the third difficulty, the problem of not freezing the time period to the point of making the provision completely meaningless. The court rulings and scholars did not see the need to deal with the two last shortcomings.

This Article offers an appropriate response to the second and third shortcomings. It suggests adopting principles from the procedure of a motion for cancellation of an *ex parte* decision. That procedure historically also suffered from the same problems. With respect to the second shortcoming, this Article proposes allowing an appeal only on the second decision, no matter what its outcome, as is customary in the procedure for a motion of cancellation. Regarding the third shortcoming, this Article suggests "freezing" the time to appeal the first decision, so that it begins to run only from the day of the decision on the correction motion. The American federal legal system also freezes the time to file an appeal when a motion was filed to correct a clerical error, and the time period begins to run only from the decision on the motion. The resolution of the third shortcoming will in any event resolve the first one as well. If the time to appeal the first decision is "frozen" and begins only from the day of the decision on the correction motion, then it is not fundamental whether the decision is given within twenty-one days or afterwards. The suggestion that remedies the third shortcoming, and in any case the first one, may certainly be implemented by the legislature – the time has come to do so.