Court rulings involving individuals with dementia in Israel: A qualitative perspective

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Abstract

Background: Individuals with dementia may appear before the courts in different roles. Despite the growing interest in the rights of older persons with dementia, relatively little empirical data exist regarding their actual interactions and experiences in court.

Methods: This study used a qualitative, textual analysis methodology. A total of 281 Israeli legal court cases, which addressed issues relating to dementia, were analyzed.

Results: Four key themes were found in the legal texts: (1) The legal construction of dementia and its relationships to old age; (2) The importance of procedural justice; (3) The implications and outcomes of the legal process; and (4) The legal implications to the society as a whole.

Conclusions: The legal narratives, which surround legal cases that deal with dementia in Israel, reveal an internal tension between stigmatic and anti-stigmatic narratives. This complex reality raises the need for further research and for a clearer judicial policy.

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Introduction
As the world ages, the number of individuals with dementia is increasing (Doron, 2014; Ferri et al., 2006; Prince et al., 2013). People with dementia, like other older individuals, have legal rights and concerns and face unique issues and challenges. They may appear before courts in different roles: as victims, as witnesses, and as persons standing up for their rights and they can do so either on their own or through their representative decision-makers/guardians. Moreover, as members of a unique group within the older population, their rights have received increased attention within the global process of establishing a new, binding international instrument for the advancement of older persons’ rights (Doron & Apter, 2010; Kelly & Innes, 2013).

Despite growing interest in the legal aspects of the rights and inter-relations between dementia and the law, however, very little empirical data have been collected or analyzed in this field. Although much of the literature has comprised theoretical discourse on ethical-legal issues (e.g. Monaghan & Begley, 2004; O’Neill & Peisah, 2011; Welsh, Hassiotis, O’mahoney, & Deahl, 2003; Woods & Pratt, 2005), until recently, no empirical studies have mapped the real contexts in which persons with dementia interact with the courts. In a recent study, Doron, Werner, Spanier, and Lazar (2017) published the first quantitative-based, descriptive picture of the appearances of individuals with dementia before courts in Israel. The goal of the present study was to complement this descriptive-quantitative analysis with a richer qualitative, textually based, content analysis. This rich legal narrative perspective might broaden and deepen our understanding about the roles played by the law and the courts in the lives of persons with dementia.

Literature review

Dementia and aging
Dementia is a clinical syndrome characterized by an acquired impairment of memory and cognition (Román, 2002). The overarching concept of dementia is comprehensive, with diverse clinical profiles and courses, although Alzheimer’s disease (AD) is the most common type (75% of cases; Peng, 2003; Prince & Jackson, 2009). Dementia is commonly progressive—but also dynamic—in nature. Despite considerable advances in knowledge of its diverse pathogenesis, no “cure” has been found yet (Bregman & Moore, 2014). However, some treatments and interventions have been successful in preventing or slowing down its symptoms and for some patients even provided transitory improvement in symptoms (e.g. Korczyn & Vakhapova, 2014; Rutten, 2017).

The dramatic demographic changes in recent years have had many medico-socio-economic consequences, some of which directly relate to dementia (Estes, 2001). Indeed, recent epidemiological studies have estimated that the global prevalence of AD will rise from...
27 million cases in 2006 to 66 million and 115 million in 2030 and 2050, respectively (Brookmeyer, Johnson, Ziegler-Graham, & Arrighi, 2007). More specifically, age has been found to be the strongest predictor of dementia (Lee et al., 2002). For example, while prevalence rates of dementia for persons aged 65–69 years range from 1.2% (in East Asia) to 2.6% (in Western Europe and Southeast Asia) and 2.8% (Australasia), this figure increases significantly in persons aged 90+ years, where the corresponding figures are 28.7%, 43.1%, 35.4%, and 38.3%, respectively (World Alzheimer Report, 2009). These significant changes will naturally be accompanied by an increasing number of legal cases involving persons with dementia.

**Law and dementia**

Indeed, elevated interest in the field of law and dementia has characterized the last two decades (Foster, Herring, & Doron, 2014). The diverse literature in this field can be divided into three main categories:

1. Specific scholarly articles and studies on law and dementia. This category of literature usually focuses on the rights of people with dementia (Boyle, 2008, 2010; Manthrope, Samsi, & Rapaport, 2012) such as their right to receive appropriate socio-medical care (Kapp, 2008), as well as to autonomy, dignity, and personhood issues (Doron & Foster, 2016; Mäki-Petäjä-Leinonen, 2016).

2. Broader studies on issues of legal competence and/or legal capacity (its definition, assessment, and relevance to particular legal contexts and within particular jurisdictions), including discussions on dementia as an example of a situation that can lead to legal incapacity. This category is broader in its scope and addresses legal concerns surrounding persons with dementia within the legal context of “capacity” (e.g. Jacoby, 2010; Liptzin Peisah, Shulman, & Finkel, 2010; O’Neill & Peisah, 2011; Shulman, Peisah, Jacoby, Heinik, & Finkel, 2009), “competence” (e.g. Giroux, Tétrault, & Landry, 2015; Marson, Ingram, Cody, & Harrell, 1995), and “consent” (e.g. Fellows, 1998; Haberstroh & Müller, 2017). In addition, this body of research addresses the experiences of persons with dementia in the context of the legal experiences of adults with disabilities in general (e.g. McLeod, Philpin, Sweeting, Joyce, & Evans, 2010).

3. General studies and scholarly articles on legal protection for at-risk adult populations, where persons with dementia are considered at-risk. For example, the presence vs. the absence of dementia and AD play important roles in the context of guardianship proceedings and interventions by Adult Protective Services (APS; e.g. Kane, 2001; Kapp, 2003).

It is noteworthy that a significant conceptual development in the legal debate surrounding the rights of individuals with dementia occurred after the enactment of the UN International Convention on the Rights of Persons with Disabilities (CRPD) (Doyle & Flynn, 2013; Kanter, 2009; Quinn & Doyle, 2012). The CRPD affirmed that persons with disabilities, including dementia, enjoy legal capacity on an equal basis with others in all aspects of life. In addition, it positively imposed a duty on State Parties to provide the necessary support that persons with dementia require to enable and empower them to
exercise their human rights. Undoubtedly, this paradigm shift has changed the legal landscape with regard to the rights of persons with dementia (Donnelly, 2014; King & Series, 2014). Although no systematic quantitative empirical study has evaluated the impact of the CRPD on court rulings, a growing body of scholarly writings is focusing on case studies and providing examples of the actual legal impact of the CRPD on legislation and case-law (e.g. Clifford, 2011; Harpur & Bales, 2010).

Nevertheless, to our surprise, the attempt to narrow the search from the broad field of “law and dementia” to the specific topic of an empirical analysis of court rulings produced no results whatsoever. Even though most of the aforementioned scholarly articles refer to some legislative framework or to specific case law or legal precedents, none of them is based on empirical research. As mentioned above, the first descriptive quantitative study in this field was published in 2017 (Doron et al., 2017). However, this study was limited to its statistical descriptive nature: it did not attempt a qualitative analysis of the actual text and language used by the judges. Therefore, the aim of the present study was to broaden and complete this descriptive mapping with a more qualitative and in-depth textual perspective of the actual legal reality as reflected in the court rulings.

It is important to note that this study was conducted in the context of the Israeli legal system. Historically, Israel had a common-law based, adversarial legal system, but throughout the years, has developed a unique body of original jurisprudence (Navot, 2007). It should be noted also that per the time period covered by this study, Israel’s law was still based on an anachronistic legislation known as the Legal Capacity and Guardianship Act of 1962. Therefore, and unlike jurisdictions which have reformed their guardianship and legal capacity laws, Israeli law did not formally recognize tutors, best friends, intermediaries, or other legal supportive mechanisms to persons with mental disabilities. Finally, while specialized “Family Affairs Courts” in Israel hold exclusive jurisdiction in cases of guardianship, estate and administration, other courts are authorized also to rule on legal competence in the context of their main jurisdiction (e.g. contract or criminal law; Doron, 2004). Hence, similar to other case-law-based studies, its findings should be read within its relevant socio-legal context.

**Methodology**

Court judgments were read and analyzed with the aim of identifying and classifying statements with substantive content, which include the court’s perception, construction, and ethical stance toward individuals with dementia who came before the court or whose rights were to be secured.

Within the broad tradition of qualitative textual analysis, this study adopted a methodological framework known as “narrative justice.” According to this method, all judicial decisions are, in essence, literary-ideological texts (Love, 1998; Martinez, 1999; Yuval, 2002). This narrative approach to the legal world examines the legal texts as one would a literary text, and extrapolates that the law functions as a narrator of sorts, who constructs the story (the narrative) in a manner which leads to and justifies the results that she/he wishes to achieve at the end of the tale (Almog, 2001; Weisberg, 1982; West, 1985).
Sample and the sampling process

The sample and sampling process were described in detail by Doron, Werner, Spanier and Lazar (2017). In short, the sample of court cases was collected after conducting computerized searches of one of the most comprehensive Israeli case-law databases known as Nevo (www.nevo.co.il). The computerized search was conducted using relevant keywords (e.g. dementia, AD, and senile). Due to time and budget constraints, the timeframe for the search was limited to the decade from 1 June 2004 through 30 May 2014. The search resulted in 1009 court rulings. After screening for duplicates (court rulings that were published twice or appeared in different forms but were actually the same ruling), the sample was narrowed to 860 cases.

At this stage, all cases that included one or more of the keywords were screened again using the exclusion criteria of incidental or indirect relevance to the topic. Thus, all court rulings that addressed dementia indirectly or incidentally, i.e. those that included one of the keywords but had no direct relevance to legal issues involving dementia or those having potential relevance to dementia but addressed it indirectly, were excluded. This screening strategy has been used in previous studies (Spanier, Doron, & Milman, 2013). Following this screening, 580 cases were excluded, leaving a final sample of 280 cases that directly addressed legal issues regarding dementia and/or individuals with dementia. This final sample was the basis for both the quantitative and qualitative analysis. An extensive quantitative analysis of the sample (e.g. a break down to different fields of law, types of courts, socio-demographics of the persons with dementia) could be found in Doron, Werner, Spanier and Lazar (2017).

Analysis

Similar to other phenomenological and narrative analyses, the first stage was to familiarize the researchers with the text. To ensure credibility, all court rulings were read in full by at least two of the researchers, and most of them by at least three. After the general reading, a more focused and consistent reading was conducted with the aim of looking for meaningful texts, reasoning, and words as they relate to the constructions and meanings given to dementia and individuals with dementia within the court rulings. In the last stage, broader categories were identified and subthemes were grouped into units of meaning relevant to the study aims.

The researchers performed the thematic analysis while aware of their personal biases. As part of ensuring the trustworthiness of the content analysis, the research team consisted of four members, with diverse personal scientific backgrounds: three males and one female; three researchers had legal backgrounds while one was a sociologist with limited legal knowledge; the group consisted also of researchers with different levels of experience both in quantitative and qualitative studies, and at least two researchers had conducted studies in the field of dementia in the past. This very diverse research group, which adopted an ongoing personal reflection dialogue throughout the analysis process (e.g. being transparent about one’s prior positions and biases and openly reflect on it), minimized the effects of these personal prejudices (Berger, 2015). Finally, a “thick description” approach was used in reporting the findings, to allow the readers first-hand experience of the judicial texts that were the basis for the analysis.
**Ethical considerations**

The study’s protocol was approved by the Ethics Committee of the Faculty of Welfare and Health Sciences at the University of Haifa. Moreover, because the study was based on publicly available and openly published court rulings, there were no concerns regarding privacy or informed consent. However, all the data used in this study were screened in order to maintain the anonymity and privacy of the participants in the legal procedures.

**Limitations**

First, this study was anchored within the unique Israeli legal and cultural context, which might differ significantly from other jurisdictions. Second, it should be noted that not all cases are reported and included in Israel’s public databases, and therefore the actual “representation” of the existing case law might be partial. Finally, the legal texts analyzed in this study were based only on the judges’ rulings. Hence, rich data (e.g. cross-examinations, expert-opinions, affidavits, etc.) from the court archives were not viewed or examined. As a result, for example, it was not always possible to know if the judges’ rulings were a simple repetition of the experts’ opinions, or their own stigmatic interpretations. These limitations must be taken into account when interpreting our findings. Future studies are recommended to go beyond the published rulings and to examine deeper and broader data in the court files.

**Findings**

The textual analysis of the judicial texts produced four major themes, each with several subthemes. A summary of these qualitative findings is presented below.

**Theme 1: The legal construction of dementia**

The first theme that emerged from the judicial texts, the judges’ words, and the arguments by the different sides dealt with how dementia was perceived during the legal proceedings and how individuals with dementia were portrayed, whether by experts who had assessed them or by professionals or family members, who had been asked to describe the individual to the judges responsible for passing judgment. Three main subthemes emerged in this context:

**Subtheme 1a: Dementia as an old-age illness—“Old age is liable to be difficult and even insufferable”**

Many of the court decisions expressed the approach that dementia is an illness that is not only strongly linked to old age, but is also a dreadful disease that reflects the negative sides of increased life expectancy in the modern age. A salient example in this context can be found in Criminal Case (Haifa) 983–07-09, in which the criminal was an older person with dementia. The following excerpt illustrates how the court tells the story of AD in the broad social context:

The further a man progresses toward old age, the more fervent the aspiration/prayer not to become a burden and that his old age will not shame his youth. This prayer is not always
answered. Scientific progress and good living conditions as well as abundance and health services from the second half of the previous century have extended the human life span and as a result, the chances of succumbing to the illnesses of old age have proliferated. The extended family is not used to living together under one roof, but rather every couple and its children on their own, and when they marry, the youngsters move into a separate apartment. If there was a time when the wife stayed at home and her job was also to look after the old person in the house, nowadays it is customary for both spouses of working age to work outside the home. In these circumstances, old age is liable to be difficult and even insufferable due to the illnesses it brings with it and the isolation and neglect.

The court describes how increased life expectancy has brought a blessing as well as a curse, in the form of old-age illnesses, of which AD is one.

Another manifestation of the association that is made between old age and dementia is to be found not necessarily in the court decision but in the evidence presented to the court in response to queries about the source of the person’s dementia diagnosis. For example, in Inheritance Case (Tel Aviv) 102850/9:

When the deceased was asked why it says in the 2003 discharge letter from Mayanei Hayeshua Hospital that the deceased was suffering from mild dementia, he answered: “I worked in the hospital for many years and we wrote these kinds of things about any old person who was brought breakfast and didn’t want to eat.”

Therefore, not infrequently, the courts appear to perceive AD as a type of “evil” expected to befall people as they age, as inseparable from the values of increased life expectancy and the growing number of older people in society. In many cases, this perception simply reflected the fact that older people suffering from confusion or being physically dependent were automatically labeled as “demented” either by family members or by formal caregivers and professionals.

**Subtheme 1b: A person with dementia as neglected, dependent, and helpless (or: “nature would appear to have been cruel”)**

Not only does the court make a natural connection between aging and AD, but some court decisions use rhetoric that contains a somber description of a person with dementia as helpless: not merely legally incompetent, but also completely dependent on the assistance of others. A typical example of this kind of description can be found in Criminal Case 31314–09-11.

The fact is that she [the demented wife] was completely helpless and entirely dependent on whomever was taking care of her. The complainant was not oriented in the situation around her; she could not do anything on her own; she could not even sit unaided; she had no sphincter control; she needed help to do anything and she needed constant supervision. She could not defend herself or say what was done to her.

A similar tone can be found in additional court rulings, when the court in fact makes a direct and clearly causative connection between the “nature” of the illness and the person’s
“helplessness” and between the illness and “nature’s cruelty.” This was apparent, for example, in the judge’s words in Civil Case (Nazareth) 228–06-08:

Nature would appear to have been cruel to B. According to the illness summary from Rambam Hospital (dated August 13, 2009), B is suffering from degenerative brain disease and dementia. He has problems with most of his functions: lack of orientation in time, serious attention and memory disorders; considerable difficulty with visual perception and difficulties with language functions, as well as behavioral disorders and lack of comprehension of his condition.

This type of association between dementia and helplessness is not surprising in light of evaluation reports by medical specialists presented to the court. The experts’ descriptions are quoted by the courts when making judicial decisions. A salient example of this descriptive pattern can be found in a citation chosen by the Rabbinical Court from a medical opinion concerning a woman with dementia, whose husband filed for a divorce—Rabbinical File (586335/2):

During the examination, she was sitting in a wheelchair, head bowed, blind, and giving irrelevant or incorrect answers to questions about her age, marital status, place of birth, and so on. Memory problems and general disorientation were prominent. Toward the end of the conversation, she suddenly claimed to be married and even mentioned her husband’s name. X is suffering from discernible cognitive impairment and requires assistance with all daily functions. Hence, it is neither possible to rely on what she says, since she contradicts herself, nor to rely on her judgment in regard to accepting a divorce. There is no point in bringing her before the Rabbinical Court in Haifa in this condition.

Based on this assessment, the Rabbinical Court has no difficulty in reaching a judicial outcome for this case:

In the circumstances of this case, the wife is a complete simpleton, stupidity allegedly including all the signs brought, pronounced memory disorder and orientation disorder in every sense. This woman is certainly someone who “does not know how to look after her divorce certificate” or “does not know how to take care of herself.”

Subtheme 1c: The dynamic nature of dementia

Alongside the court decisions and statements about the helplessness of people with dementia and the realistic and serious descriptions that emerge from the reports of the specialists and the court alike, some decisions were found to disclose a more complex picture of the disease. These court decisions emphasize the dynamic condition of AD, depending on its stage of development. For example, in Inheritance File (Tel Aviv) 105110–06, the court determined that:

Concerning dementia in particular, as the deceased was diagnosed in our case, close to the date of signing the second will, by Dr. H’ who examined her in March–April 1998 (the signature date:
March 12, 1998) for the purposes of filing a motion for the appointment of a guardian, and in
the expert opinion and testimony of Prof. F, although it is not defined as mental illness, since it is
a gradual process, there must be a diagnosis of where the deceased was in the development of the
illness. For the mental condition of a person at the onset of the dementia process is not the same
as the condition of someone with full-blown dementia.

Indeed, rulings of a similar nature could be found in many court judgments (Family Case
(Krayot) 25645–11-10; Inheritance Case (Rishon Lezion) 33872–05-11, or Inheritance Case
(Jerusalem) 49160/08), of which the common factor was the basic approach according to
which the cognitive deterioration is:

A gradual process, and therefore it is important to diagnose where the testator is from the point
of view of the development of the illness. For the mental condition of a person at the onset of the
dementia process is not the same as the condition of someone with full-blown dementia and
certainly not at its end.

Furthermore, in some of the decisions, not only is the cognitive deterioration process
described as progressive and dynamic, but it is clarified also that the deterioration does
not necessarily lead to helplessness or legal incompetence. Expressions of this nature can be
found in decisions in which the court refused to equate dementia with helplessness or
incompetence. For example, the attitude of the court in Inheritance Case (Jerusalem)
49160/08 is illustrative:

However, even if that mild level of dementia and lack of interest in his surroundings, as stated
by Dr. P in his expert opinion, did also cause the extreme neglect of his body and living
conditions as reported, this is not sufficient to testify to the deceased’s physical or mental
dependence on others to the extent of concern of improper influence on him at the time he
was drafting his will.

The deceased was not housebound, the deceased had mobility; he took public transportation
to another town; he met with people; he was not physically dependent on others and no
mental—conscious dependence has been proved.

Theme 2: On the importance of procedural justice

Whereas we saw, in Theme 1, that the courts tie AD and dementia together with the aging
process, and sometimes equate helplessness with incompetence across the board—in
Theme 2, a different perspective emerges. This theme emphasizes a more complex reality
in that the implications of AD and dementia are not clear-cut and an examination must be
performed to diagnose the person’s stage of illness and level of functioning. Therefore,
based specifically on the understanding of the potentially far-reaching implications of legal
recognition of a person as “helpless,” different dimensions emerge from Theme 2 regard-
ing the importance attributed by the courts to procedural justice.
Subtheme 2a: “The attorney lacks professional skills:” The need for professionalism, supportive evidence, and expert opinion

Emerging from the court judgments is the courts’ attempts to avoid errors by drawing on expert opinions and refusing to declare the presence or absence of dementia without clear supportive evidence. For example, in Civil Case (Tel Aviv) 58631–08, the court determined that:

The defendant’s claim concerning his mother’s condition (an Alzheimer’s patient) is merely asserted without a shred of evidence. No medical certificate has been submitted and/or any other document in support of that assertion by the defendant. The evidentiary presumption concerning the defendant’s failure to bring relevant evidence, determines [that] if a litigant has failed to bring relevant evidence which is available to him, it can be concluded that if he had brought the evidence it would have acted against him and his omission serves to reinforce the opposing party’s version.

Furthermore, the court is seemingly not satisfied with the evidence provided or with a decision of someone who lacks professional knowledge in the field, such as attorneys who are involved in the preparatory procedures and the signing of the will. See, for example, Inheritance Case (Jerusalem) 49160/08:

Regarding the testimony of the attorney who drafted the deceased’s will, the defendant claimed that he [the attorney] admitted that he did not draft the entire record of his conversation with the deceased and did not even remember important information about the deceased, which raises the suspicion that he only rubber stamped a process that was entirely planned by the plaintiff, all even more so that the attorney did not have professional qualifications to diagnose the deceased’s cognitive state.

Nevertheless, the need to exercise caution and to rely exclusively on experts occasionally leads to difficulties. Our analysis showed that, in most cases, the opinions are submitted by physicians: geriatricians, neurologists, or psychiatrists. However, even in these cases, doubts sometimes arise regarding the level of expertise, and naturally, the attorneys of one party try to cast a doubt on the opposing party’s experts. This makes it difficult for the courts to determine the genuine expert in the field. An illustrative example of this complex reality can be found in Civil Case (Tel Aviv) 39781/03, in which an opinion was presented by a “psycho-geriatrician,” who was asked about his level of expertise in view of the fact that he was not a “psychiatrist.”

The expert admitted that he is not a psychiatrist [Note: he was a psycho-geriatrician], but he is qualified to give an expert opinion on this subject . . . Psycho-geriatrics does not belong to one discipline but to two: psychiatry and geriatrics. Psycho-geriatrics is not a subspecialty recognized by the scientific council. Both a psychiatrist and a geriatrician can engage in it. The expert also added that: “Those engaged in the psychiatry of the adult in Israel are the geriatricians,” and even added that psychiatrists get into difficulties when they examine adult patients: “Every expert opinion can add something, but if you ask me honestly about the condition of extremely elderly and sick people—the unpalatable answer is that it is extremely problematic for psychiatrists to examine them because of the complexity of their
illnesses. That is the reason why they did not deal with the elderly for many years. It is very difficult to separate all these problems from the psychiatric examination.”

Subtheme 2b: Time and timing—Two months is a “significant period of time” when it comes to dementia

An analysis of the judgments indicates that the courts do not only draw on expert opinions to ensure the accuracy of their decisions regarding dementia implications, but also address the potential time elapse between the evaluation and the opinion in writing. Due to the awareness of the dynamic nature and regressive dimension of dementia, the courts often insist that the opinion be written shortly before or immediately prior to the legal proceedings requiring the decision. For instance, where contracts or wills are involved, the courts insist that the opinions refer to the dementia at the time of writing or signing the agreement; otherwise, the opinion loses its value. For example, in Small Claims (Tel Aviv) 25632–03-10, the court determines as follows:

Ms. Stern claims that the opinion she presented testifies to the plaintiff’s medical and mental condition. The opinion does testify to that, and the proof is that based on it the family court granted [the motion] and appointed a guardian to the plaintiff. However, the opinion was drawn up on the basis of an examination conducted on the patient on August 04, 2009. In other words, two months after the fee agreement was signed with the plaintiff. Not only can it not be deduced from that opinion that two months before it was given, the plaintiff was not clear in his mind, but also Ms. Stern herself testified to that in her testimony, and claimed in these words: “It is impossible to determine when the plaintiff became ill; before the visit to the attorney, during the visit, or after it. That is a feature of dementia.”

The time dimension was emphasized by the court especially in regard to the passage of time and its importance concerning an illness of a dynamic and changeable nature such as dementia. Thus, for example, in Inheritance Case (Haifa) 50279–12-10:

And it should be emphasized: The opinion was given some eight months after the will was drafted, a considerable period of time for a vascular dementia patient, since over those months there may be deterioration, as emerges from the opinion. But it also emerges from it that the deceased partially comprehends her condition and her relationship with her children remains consistent.

Theme 3: On the legal implications of dementia—
The individual’s viewpoint

Whereas Theme 1 emphasized the general context in which dementia was sketched as a dreadful disease of old age, Theme 2 emphasized the court’s desire to ensure a precise and accurate diagnosis, through a fair process including an up-to-date and timely opinion. Theme 3 progresses to the outcome of the process: What happens to the person with dementia at the end of the legal procedure? This question is, in fact, subdivided into two separate questions: the first, which will be described in this theme, relates to the legal
outcome concerning the individual regardless of the obligation of the state toward the person with dementia; the second, which will be described in the fourth theme, relates to the legal outcome concerning the legal obligations of the state toward the person with dementia.

We will begin with a review of the findings concerning the first question. As we will describe below, two central subthemes could be identified in regard to this question; one, that the outcome of including the individual in the dementia category actually means exclusion from the application of the law (3a); two, that inclusion benefits the individual in the sense that the court is willing to be lenient or to consider the person’s condition (3b).

Subtheme 3a: “The accused with dementia cannot be brought to court”

This first subtheme deals with the lack of congruence between the condition of individuals with dementia and the fundamentals of the legal field. This might lead to a cancelation or a stay of execution or even to the removal of individuals with dementia outside of the bounds of the legal process.

For example, in Civil Case (Di.) 1034–08, which was a financial case, we can see a motion to grant a stay of execution of a financial judgment in view of the defendant’s dementia illness. The court granted the motion and determined:

In coming to weigh the circumstances of this case, I consider that the proper balance of convenience between the parties demands according weight to Respondent 2’s age and her medical condition as asserted by the applicant and the risk that her condition will rapidly deteriorate with all that entails, including the need to appoint a guardian.

Concerning Respondent 2, I found that there is evidence as to the serious condition of her health, which might make collection difficult for the applicants, and therefore the balance of convenience between the parties demands granting the motion [i.e., to stay the execution of the judgment].

We found similar problems with writs of execution in Originating Motion (Tel Aviv) 37204–11-09, in which the court ordered a stay in execution; or in procedures in which it was claimed that, due to the person’s illness, she was incapable of consenting to a court decision by way of compromise (5010/06) or of consenting to a fee agreement with the attorney) Tel Aviv [Herzliya] 40383–02-10; and finally, even with procedures in which individuals with dementia were required to bear witness and the court ruled that they could not be brought to testify (Criminal Case [Jerusalem] 26839–02-13).

Exclusion from the legal playing field has additional implications outside the court and concerning issues that have no connection whatsoever to a court of law. For example, a decision that determines that a person with dementia is incapable of registering a warning note in the Land Registry Office (Tel Aviv 9048–05-09) or of granting a lawyer power of attorney in arbitration procedures (Permission for Civil Appeal [Tel Aviv] 44113–06-13) or of being a foster family (Miscellaneous Petitions [Jerusalem] 2346/06). The common thread running through all the decisions described above reflects the court’s perception of individuals with AD as outside the bounds of the legal procedure, and hence, sometimes, there is no reason or benefit to going ahead with the legal procedure.
Subtheme 3b: “There is no room for severity of judgment”—Alzheimer’s as a consideration for leniency of judgment

As opposed to the previous theme, in which the person with AD was completely excluded from the legal playing field, a slightly different theme emerged from several decisions in which the court left individuals with Alzheimer’s inside the legal arena, but showed leniency in different ways.

In the criminal context, for example, the fact that a person had dementia was frequently raised as an argument for leniency of punishment. One of many examples of a court’s indecision and eventual leniency of punishment due to AD can be found in Criminal Case (Beer Sheba) 8310/06:

The psychiatric opinion reveals that despite optimism regarding the possibility of the accused stabilizing with the therapeutic treatment given to him, at the same time it mentions the danger observable in the accused, ostensibly increasing, in view of his deteriorating medical condition and the cerebral disorders from which he suffers. In these circumstances, there is room to impose a punishment that will be an expression of deterrence and retribution. However, there is no room to impose a harsh and lengthy sentence on the accused as the prosecution is petitioning. In view of his medical and mental condition and his definition as mentally frail—and because the accused well understands what is being done with him—the accused needs treatment and nursing, and no lengthy sentence should be imposed on him that might cause additional deterioration and worsening in the fragile state of his health. As previously stated, this is not something that is lost on the accused.

Or in the same spirit, consider the words of the court in Criminal Case (Ramla) 3841–06:

In balancing the public interest and the stern punishment policy proper for tax crimes, I initially considered that there was room to examine the possibility of imposing a custodial sentence that he would serve in service work. However, due to the condition of the accused’s health [dementia], the Service Work Director decided that the accused is unsuitable for service work. Then I considered that there is room to examine the possibility of public service work, however the test service says that in view of the condition of the accused’s health, he is incapable of doing public service work. In these circumstances in which due to circumstances that are not dependent on the accused, he is incapable of doing service work or public service work, I consider that there is no room to treat the accused harshly and to impose on him a sentence behind bars. I consider that such a punishment would fail to strike the proper balance between the objects of punishment given the accused’s specific personal circumstances, and in particular his cognitive condition and the dementia from which he suffers.

The argument for leniency when dealing with individuals with dementia is expressed not only in criminal procedures but also in civil procedures. For example, in Civil Case (Rishon Letzion) 5034/06, the judge decided to exempt the defendant—a woman with dementia—from court expenses inter alia because of her serious medical condition; and in Civil Case (Haifa) 12244/03, concerning a property tax debt of a person with dementia, when the person was obligated to pay the debt, but was exempt from paying interest and court expenses; and another example, in Civil Case (Tel Aviv) 64085/07, which rejected the
claim of an abuse of process when a person with Alzheimer’s did not show up at court hearings, did not provide a personal defense, and did not give personal testimony.

**Theme 4: On the legal implications of dementia—The society’s perspective**

The final theme deals with the court’s conceptualization of state obligations toward people with dementia, especially in the context of legal procedures that are brought before the court to protect the individual with dementia or to secure the person’s rights. The two subthemes found here represent two contradictory approaches that were observed in the court decisions: the first (4a) places the responsibility of protecting people with dementia on the state, even at the cost of intervening in their lives or of bending the law. The second (4b) emphasizes the autonomy of people with dementia, and their right to shape their own lives, even at the cost of personal risk. These two subthemes are illustrated below:

**Subtheme 4a: “The state of Israel cannot turn its back on its older citizens”**

The situation depicted by a considerable proportion of the reviewed court decisions was that when the courts are required to care for and protect dementia patients on behalf of the state, the rhetoric attributes great importance to protecting people with dementia, who are dependent on the help of others and are incapable of looking after themselves. For example, in Administrative Appeal (Tel Aviv) 1228/06, the court expressed itself in the following words:

> The State of Israel cannot turn its back on an elderly citizen, a Holocaust survivor, who suffers from serious illnesses, both physical and mental, in a way that would satisfy the literal provisions of the law, but there is a real concern of actual damage to and deterioration in Petitioner 1’s physical and mental condition to the extent of concern over saving a life as a result of her history of suicide attempts and hospitalization.

> ... Whether we take the line of non-conforming use of special humanitarian considerations, the principle of the good of the elderly and a prohibition on disproportionate harm to him pursuant to the Basic Law: Human Dignity and Liberty, the Hebrew law or inherent authority to extend the dates determined in the law or for the purpose of granting substantial relief, the result in this case is the same and leads to the granting of the petition so as to prevent an injustice and real damage to Petitioner 1 to the extent of saving life while giving expression to the sense of just punishment by the court in this special case which, in my opinion, demands reaching a result of the aforesaid type.

Or another example can be found in Civil Case (Hadera) 2165/05, which dealt with the claim of a kibbutz member with dementia when the kibbutz was privatized and consequently did not support him financially due to the cost of the nursing treatment.

> That kibbutz decided by majority opinion in a vote conducted by its members that the kibbutz must be privatized and so in effect every kibbutz member would benefit from the fruits of his work without sharing them with the other kibbutz members, but all his current expenses that until then had been financed by the kibbutz, from that date on would be borne by the kibbutz member himself.
This concerns an 87-year-old who, for most of his life, put all his efforts and commitment into contributing to and working for the kibbutz community. And now, when a cruel disease strikes him down, the kibbutz would like to cast him aside and not help him with the turmoil that is his daily companion in the last remaining days of his life.

In the Basic Law: Human Dignity and Freedom, it states that human dignity must be protected against any abuse. In the case before us, the kibbutz did not attach any importance to it and abandoned Mr. K. to cope with his difficulties alone.

**Subtheme 4b: “The country’s authorities ought not to intervene in the personal life of an individual”—On the right to autonomy for individuals with dementia**

As opposed to the protective expression described in subtheme 4a, we identified a contrasting rhetorical pattern, which rejects intervention in the lives of individuals with dementia because of the need to protect them. In Originating Motion (Tel Aviv) 25089–01-12, the court determined as follows:

At the end of the hearing, I decided that, owing to the difficulty in this case deriving from the clash between the right to personal autonomy and the concern of the public and its authorities for the weak in society, a decision cannot be made lightly.

For my part, and as I have already previously emphasized, the most sparing use must be made of these powers, and our guiding principle must be that every person has the right to his life and also to end it as he sees fit, obviously as long as his actions are not against the law.

The country’s authorities, including the courts, ought not to intervene in the personal life of an individual or at its end. If the person wishes to spend the last years of his life at home, in a familiar environment, we must respect that.

The clash between the right to personal autonomy and the concern of the public and the authorities for the weak in society is not easily resolved. There is no doubt that this is not a simple situation but I consider that, in general, the former has the upper hand and only in extraordinary circumstances, exceptional and clear-cut, is the will of the authority, which in fact represents the will of a healthy society, to be imposed on the individual.

In other judgments, too, examples could be found of a social and judicial world view that seeks to express recognition of the autonomy of people with dementia, and not to accept—automatically—the approach according to which its very existence justifies the state’s intervention in the life of the individual.

**Discussion and conclusion**

If we attempt to summarize the overall picture of the findings, from the thematic analysis of the court decisions, the following model can be drafted, reflecting an inherent tension between two contradictory approaches regarding the judicial construction of AD and how the law ought to relate to people with dementia (see Table 1):
In our opinion, the overall picture emerging from the model described above enables the courts to move freely between stigmatic and anti-stigmatic narratives regarding everything to do with the construction of dementia in the judicial procedure, in accordance with what the courts perceive as just and correct in the circumstances of the specific case.

On the one hand, it enables the courts, in cases in which it believes this to be justified, to adopt a discourse in which the dementia is described as a dreadful and cruel illness of old age. This discussion is justified and supported by the level of procedural justice while enlisting the opinions of expert physicians, who adopt difficult theories of neglect and confusion. At the end of the day, the result achieved is “proper” from the court’s point of view: excluding the person with dementia from the legal playing field (e.g., determining that she is incapable of standing trial or invalidating the person’s signature in a contract or a will), or, alternatively, justifying intervention in the personal life of the individual (by appointing a guardian or removing the person from home) based on the rationale that it is proper and correct that the court protect helpless people.

On the other hand, however, when the court considers the opposite outcome to be appropriate, judicial discretion allows the court to play down the stigma of dementia while emphasizing its procedural and gradual nature; it also enables the court to reject the inclusion of the individual in the dementia category in the absence of satisfactory professional opinions; and finally, it offers varied and creative “exploitation” of the dementia by the court, either through leniency of judgment regarding the person with dementia, or by adopting rhetoric emphasizing the human rights and the right to privacy and autonomy of the individual with dementia.

These contradictory judicial narratives of dementia and its legal construction can be viewed in different ways. One approach can justify such a reality as simply being a mirror of the complexity of dementia. Real life cases involving persons with dementia are complicated, complex, and diverse in nature. It is only natural that, in some cases, the individuals will be found by the courts as capable and autonomous while rejecting the attempts to revoke their personal autonomy; and in other cases, the severity of the illness will indeed justify the legal intervention and protection.

However, a more critical approach may argue that this “flexible” and “contradictory” picture may reflect the lack of clear and coherent legal policy when it comes to individuals with dementia. In the last 20 years, and especially since the adoption of the Convention of

<table>
<thead>
<tr>
<th>The stigmatic narrative</th>
<th>The non-stigmatic narrative</th>
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<tr>
<td>Dementia is a dreadful and cruel illness of old age</td>
<td>The helplessness and dependence are subject to the status/stage of the illness and not to the illness itself</td>
</tr>
<tr>
<td>Dementia causes helplessness and dependence</td>
<td>If conditions are not upheld and in the absence of experts, there is no dementia, hence no special protection is needed</td>
</tr>
<tr>
<td>Procedural justice must be maintained and experts must be enlisted to protect persons with dementia</td>
<td>Establishing a dementia diagnosis does not exclude the person but may justify leniency</td>
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<tr>
<td>Establishing a dementia diagnosis automatically excludes the individual from the legal playing field</td>
<td>Establishing a dementia diagnosis does not justify denying the individual’s freedom</td>
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<tr>
<td>Establishing a dementia diagnosis justifies protected intervention</td>
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Table 1. Stigmatic and non-stigmatic narratives in court decisions

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the Rights of Persons with Disabilities (CRPD), there is a strong foundation for citizenship and human-rights based approaches toward the rights of persons with dementia (Mann, Bradley, & Sahakian, 2016; Sonnicksen, 2016; Williamson, 2015). Such an approach suggests that a “flexible” or “contradictory” legal rhetoric should not be accepted; it does not permit unlimited judicial discretion. It mandates a non-stigmatic legally-empowering approach.

Adopting this conceptual point of view stresses the need to reform the Israeli legal system in order to change the current discourse regarding dementia and persons with dementia within judicial decisions. Furthermore, and in line with findings of other studies (e.g. Werner & Doron, 2016), it emphasizes and supports the need to provide judges with special training and understanding of what dementia is, the possible powerful impact of its key characteristics, and the potential of the CRPD to help resolve some of the cases that come before them. This is especially important in advance of the predicted significant increase in cases of dementia in the coming decades.

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