20. Judicial conflict resolution in Italy, Israel and England and Wales: a comparative analysis of the regulation of judges' settlement activities

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1. INTRODUCTION: ON VANISHING TRIALS AND THE CHANGING ROLES OF JUDGES

In recent years, we have witnessed a decline in the number of trials in many jurisdictions around the world. While more cases are filed in courts, fewer cases end with a judgment given following a full trial. Instead, many cases are disposed of at various stages of the process and through various mechanisms, both outside of courts and within them. Many factors contribute to this "vanishing trial" phenomenon, one of which is the increasing activity of judges in promoting settlement and encouraging case disposition that does not follow full-blown adjudication. In other words, while trials may be vanishing (or at least decreasing), the significance of judges' work has not decreased, as judges today play a key role in changing the landscape of case disposition and in promoting settlement through adjudication.

This reality blurs the boundaries between legal procedures and "alternative dispute resolution" (ADR) procedures, and introduces new roles for judges and a whole new sphere of judicial activity.[2] This new type of judicial activity and the integration of ADR mechanisms into the courtroom raise many challenges and questions. Some of these concern the ways in which the goals and ideals behind the ADR revolution are manifested within different legal systems today. Others concern ethical aspects of the promotion of settlement in the shadow of judicial authority; access to justice; gaps between law in books and law in action; jurisprudential debates; efficiency and the public role of courts; the role of lawyers; and many other questions deriving from this phenomenon which are examined within the broad framework of our research.[3]

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[2] We recognize that judges in many jurisdictions have always been involved in promoting settlements—see, for example, Huang (1993). However, we believe that the intensity of this judicial activity, its institutionalization and move into new legal realms and new jurisdictions, as well as its relation to the ADR revolution, justify our full attention as researchers in exploring it both empirically and theoretically.

[3] This chapter is one of the first products of a five-year research project, supported by the European Research Council, aimed at studying the realm of judicial conflict resolution activities, in both criminal and civil cases, in Italy, Israel and England and Wales. The overarching goal of the project is to understand the role of judges in promoting case disposition without full-blown adjudication. Our main theoretical objective is to develop a jurisprudence of JCR practices and a current conceptualization of the role of

These new roles of judges open a sphere of judicial work that, at least on its face, seems very creative, to a large extent intuitive and dependent on the personal style of the judge. At the same time, since judges perform these activities in the shadow of their judicial authority, this creative judicial sphere raises questions regarding the rule of law and the proper boundaries of judges' activities. In this chapter we briefly overview the regulatory aspects of this unique dispute resolution contemporary method, which we characterize as "judicial conflict resolution" (JCR).[4] We offer a comparative review of the ways in which three different legal systems—in Italy, Israel and England and Wales—design the normative-regulative framework that governs judicial work in promoting settlement, and how they view the place of ADR *vis-à-vis* the judicial system and the work of judges. We discuss the main implications of the comparative study for the understanding of JCR and for setting the boundaries for its development. The chapter focuses on civil JCR, although such activities also exist in the criminal sphere in reference to plea bargains (Alberstein and Zimerman 2017).

We define "JCR" as any activity of a judge that aims to promote substantive agreement between the litigants about a resolution that ends the litigation neither through judgment on the merits nor through technical disposition (i.e., if a case was not defended or prosecuted) (Alberstein 2015).[5] We find the JCR method unique since it entails conflict resolution work in the shadow of authority, and understanding its scope and nature has significant theoretical and practical implications.

The jurisdictions we have studied—England and Wales, Italy and Israel—are the three sites of the broad research project we conduct on JCR. They represent, respectively, common law, civil law and mixed system traditions.[6] Each of these locations is characterized by a different degree of the vanishing trial phenomenon; but all of them share a significant interest in ADR over recent decades.

Judicial activity in general, and JCR activities in particular, can be regulated in various ways and by various sources. In order to map the regulatory framework of judges' settlement activities, we therefore closely examined and compared all relevant sources of regulation concerning the promotion of settlement by judges in each of these jurisdictions. These included statutes; rules of procedure; court policy documents regarding efficiency and management of caseloads; conduct and ethical rules for judges; decisions of the ombudsman for the judiciary; judicial appointment rules and criteria; reports and proposals for reforms in the legal and court system; as well as case law interpreting procedural rules and rules of judicial conduct. Combined with preliminary observations conducted in courts of first instance in the three

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judges. Empirically, we conduct several types of investigations. First, through quantitative research, we examine the extent of the vanishing trial phenomenon and its characteristics in each of these jurisdictions. Second, we conduct a large-scale observational study in courts of first instance in each location, in order to explore judges' settlement practices, and otherwise document this phenomenon, which often occurs off the record. At the final stage of the project, we plan to make recommendations, based on our findings, for appropriate court procedure systems design, and to develop and conduct dissemination activities—in particular, JCR-related judicial training programs. See jcrlab.com (last accessed August 9, 2020).

[4] We purposely choose to speak about JCR, rather than dispute resolution, since we view the conflict as the actual, broad, social phenomenon that stands at the heart of what the legal system views as legal disputes. See Alberstein and Zimerman (2017: 283).

[5] JCR is different, therefore, from the clear, more passive, adjudicative role of judges in hearing evidence and deciding cases.

[6] On the definition and characteristics of these different types of procedural systems, as well as on the blurring lines between them today, see Chase and Varano (2012).

research locations, as well as preliminary interviews with judges, lawyers and other stakeholders, we are able to provide a rich picture of the regulation of JCR in these countries and offer some preliminary conclusions on the connection between procedural law, ADR, legal culture and different forms of regulating judicial work toward settlement. Capturing the regulative framework of JCR in each country is only one necessary aspect in understanding this phenomenon; and more observations, interviews and theory building will be needed in order to expand our perspective on the changing roles of judges in an age of vanishing trials.

We have roughly divided the regulatory sources mentioned above into two groups: (1) those relating to the regulation of procedure (e.g., rules of procedure, procedural reforms, internal guidelines and various court practices; precedent and supreme court decisions interpreting procedural rules); and (2) the direct regulation of judicial conduct (e.g., qualifications for new judges, judicial ethical rules, ombudsmen of the judiciary, institutional ways of monitoring judicial work and judicial training). As we go through these sources, we aim to answer a variety of questions, including the following:

- What actions are judges authorized to take with regard to the promotion of settlement and conflict resolution, and what actions are prohibited?
- What modes of conflict resolution (e.g., negotiation, mediation, arbitration, dialogue facilitation) are enabled and perhaps even promoted by various regulative frameworks?
- What are judges expected to do as they manage their caseload, and to what degree is a judge's caseload managed and monitored by the court system?
- What can we learn about the manifested approach of each of these legal systems toward JCR?
- How can we understand the relationship between the existence or non-existence of the "vanishing trial" phenomenon and the regulation of judicial activities?

The following is a short summary highlighting the main findings of the regulative mapping, at times supported by preliminary insight from our fieldwork (observations and interviews), presented first for each country and followed by a short discussion and questions for further research.

2. ITALIAN JCR: SEEDS OF FORMALIZED CONFLICT RESOLUTION TRACKS

The Italian legal system has been dealing with a severe backlog, with an average of trial length in courts of first instance of more than 500 days.[7] As a result, Italy has been condemned several times by the Court of Justice of the European Union for violation of the principles of due process. Of the three locations studied, Italy has the highest rate of trials and the lowest rate of court-induced settlement. One might even say that the "vanishing trial" phenomenon has not yet emerged in Italy. It seems that Italy does not have a long tradition of courts attempting to favor settlement, and the legal culture considers adjudication the best manner to solve conflicts (Nelken 2004). At the same time, in recent years, the government has invested significant efforts in attempts to reform the legal system and deal with the backlog. One of the main reforms in this regard was the introduction of mandatory mediation (De Palo and Keller 2012).

[7] Judicial System Data, 2014—Council of Europe CEPEJ-STAT.

Other significant mechanisms include the creation of new procedural instruments to facilitate the promotion of settlement by judges. However, from interviews with lawyers, judges and legal scholars, it would appear that judges still do not use these new instruments very often and the legal culture is shifting very slowly, if at all; still, some movement toward the implementation of new judicial and non-judicial instruments for settlement, both before and during trial, can be identified. Specifically, in some courts—such as that in Florence (*Tribunale di Firenze*), whose administration and judges have been working with academics and mediation experts to promote settlement—one can indeed see higher rates of settlement and more referrals to out-of-court mediation (Lucarelli 2014).

One main procedural feature which distinguishes Italy from common law systems is that there is no clear distinction between the pre-trial and trial stages. Therefore, any instruments that are available to judges in order to promote settlement may be used once the proceedings have begun, and there is no defined segment in the procedure for that purpose. The main instruments available to judges today include the following provisions (all from the Italian Civil Procedure Code); first, a judge can ask the parties to be personally present for free interrogation and attempt to reconcile them. This is a significant change, since the norm in Italy is usually for the parties not to attend court and most court proceedings are held only in the presence of lawyers. Second, even when the parties are not present, Article 317 states that in proceedings before the justice of the peace, any proxy to the lawyer for trial before a judge shall have authorization to settle and conciliate. Third, according to Article 185, the parties themselves may jointly ask the judge for a free interrogation and for an attempt to reconcile them at any point until the end of the preliminary hearings. Fourth, and perhaps most significantly, Article 185*bis* states that from the first hearing and until the end of the preliminary hearing, a judge can make a conciliation proposal to the parties. This article is the first to introduce direct judicial settlement activity into the Italian legal system. Before its introduction, any settlement proposal made by a judge was considered an appropriate reason for the judge's recusal from the case. Article 185*bis* also applies during appeals. While initially ignored by the judiciary, recent case law demonstrates that in some regions and jurisdictions, judges have begun to use the possibility of conciliation proposals in order to reduce their caseload.

Finally, at any stage of the trial and also during appeal, a judge may issue a mediation order: an official court order that requires the parties to attempt to mediate the case out of court. A mediation order is a detailed and reasoned document in which the judge explains and justifies the referral to mediation—that is, clarifies why the case is suitable for mediation. Like the previous tools mentioned here, courts around the country have used the mediation order in diversified ways. While some courts—like those studied in Florence and Rome—are using it relatively often and have developed case law around it, others have completely ignored this tool.

From an ADR perspective, the idea of a mediation order may raise questions that are similar to those raised by the phenomenon of mandatory mediation. Unlike a mandatory mediation scheme, which is applicable in Italy for specific types of cases, a mediation order does not apply to all cases of one type or another, but only to those cases that a judge considers suitable for mediation. The mediation order provides a typical example of the Italian legal system's attempts to increase case disposition by way of settlement. It is typical first, in that it presents a very formal way to induce ADR and other less formal mechanisms for conflict resolution; and second, in that it allows the judge to force the parties to attempt to mediate the case outside the court. Thus, both in form and in content, the mediation order maintains a distinction between the legal procedure and ADR. In preliminary court observations performed in the

court in Florence, we found no direct efforts of judges to settle cases, except for the use of the specific forms provided by the new acts such as mediation orders and settlement proposals.

To summarize, JCR in Italy has been enabled over the last decade through the formal authorization of judges to promote settlement and to order mediation. This has been influenced by a growing mediation culture, which is developing in close relationship to the court system, including a mandatory mediation scheme and mediation centers located within courthouses. In the context of a civil law country, which suffers from a severe backlog and a low rate of settlement, with no "vanishing trials," Italy's interest in JCR is very high.

3. JCR IN ENGLAND AND WALES: OVERARCHING INSTITUTIONAL REFORMS AND PROCESS DESIGN

In England and Wales, three significant procedural reforms were introduced into the legal system during the past 30 years.[8] Overall, these reforms aimed to deal with the central challenges of the legal system: complexity of procedures, efficiency, high costs and access to justice. The 1996 Woolf report on access to justice recommended the introduction of wide case management powers for the courts, as well as pre-action protocols, in order, among other things, "to promote more, better and earlier settlements" (Woolf 1996: 9.1).

Woolf's recommendations were swiftly integrated into the system through the 1998 Civil Procedure Rules (CPR). The overriding objective of these rules is to enable the court "to deal with cases justly and at proportionate cost." For the first time, the court had a duty to actively manage cases and this remains the state of affairs to this day. This means that judges must "encourage the parties to co-operate with each other in the conduct of the proceedings," "encourage the parties to use an alternative dispute resolution procedure if the court considers that appropriate," and "facilitate the use of such procedure,"[9] as well as actively "[help] the parties to settle the whole or part of the case."[10]

Put differently—at least at the normative and declarative levels, and according to the current English CPR—judges are not just supposed to encourage parties to use out-of-court settlement methods, but should also facilitate settlement themselves. This indicates a shift from the perception of the passive adversarial judge to that of an active facilitator of dispute resolution (Dwyer 2010).

The 1998 rules also introduced the pre-action protocols, which direct parties on the steps they are required to take before coming to court. An important pre-action step is the attempt to settle the case. When filing a case in court, the parties must indicate the steps they have taken to settle the claim and indicate why those steps have failed. The pre-action protocols have resulted in increased out-of-court settlements by lawyers' negotiation, and today a standard feature of a notice of intent to sue is an offer to try mediation. This demonstrates the clear distinction we have identified in England between increased out-of-court settlement and

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[8] These reforms were: (1) the introduction of new Civil Procedures Rules (CRP) in 1998, following the report on 'access to justice' published by Lord Woolf in 1996; (2) the Jackson report introduced in 2013, aiming to deal with the high costs of litigation; and (3) the Briggs report published in 2016 proposing the opening of online courts.

[9] CPR Rule 1.2.(2).(e).

[10] *Ibid*., 1.2.(2).(f).

relatively limited JCR activities. Judges can use two mechanisms to enforce compliance with pre-action protocols: they may either stay the case until the parties have complied with the protocols or sanction the parties with increased litigation costs.[11] In 2001, in *Cowl*, the parties were specifically encouraged by the England and Wales Court of Appeal to avoid litigation.[12] In 2002, *Dunnett* demonstrated that even if a party wins in court, a judge may still impose cost sanctions upon it due to unreasonable refusal of ADR.[13] In 2003, the High Court took this a step further by sanctioning a government department for unreasonably refusing mediation, even though the party believed there was a point of law to be decided in court (and this point of law was indeed admitted and resolved by the court).[14] This case was particularly important, given that the UK government had made a pledge in 2001 that all governmental departments and agencies would first make recourse to ADR whenever possible.[15] In 2004 the Court of Appeal ruled in the *Halsey* case that compulsion to send parties to mediation was against the right to a fair trial stipulated in Section 6 of the European Convention on Human Rights, thus overturning *Cowl* and similar decisions. At the same time, the court maintained that cost sanctions could still be imposed on parties if they unreasonably refused ADR.[16] Despite *Halsey*, in 2008 *Malmesbury* continued the trend toward wider judicial power of encouraging and sanctioning parties to settle; it ruled that cost penalties can also be imposed on parties that behave unreasonably *during* mediation.[17] This marked an increase in the judges' power in evaluating and encouraging party settlement efforts, even when the efforts take place out of court.[18]

Although English judges are empowered to encourage settlement, based on observations and interviews with judges, we find that in practice they are more reluctant to do so and they mostly manage pretrial hearings in a formal manner, without providing explicit settlement proposals or being active in persuading parties to settle. Most of the incentives for parties to settle are given by the procedural scheme of pre-action protocols, cost hearings, court-annexed mediation and strict timetables. Judges do not become involved in JCR as a routine matter and they preserve their remote and passive role in that regard. The separation between the court and ADR seems to be strictly maintained.[19]

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[11] *Ibid*., 44.3; Practice Direction: Pre-Action Conduct and Protocols (n 11).

[12] *Cowl and Others v. Plymouth City Council [2001] EWCA Civ 1935X* 1935 (England and Wales Court of Appeal (Civil Division)).

[13] *Dunnett v. Railtrack Plc (Costs)* [2002] EWCA Civ 303 (EWCA (Civ)).

[14] *Royal Bank of Canada Trust Corporation Ltd v. Secretary of State for Defence* [2003] UKHC.

[15] 2001 UK Government Pledge on ADR, http://uk.practicallaw.com/1-385-1394# (last accessed 21 April 2016).

[16] *Halsey v. Milton Keynes General NHS Trust* [2004] EWCA Civ 576.

[17] *Earl of Malmesbury v. Strutt & Parker* [2008] EWHC 424 (QB) (Queen's Bench Division).

[18] In his study of the Mayor's and City of London Court, Simon Roberts finds found that 62 percent of defended claims are settled before being allocated. See Roberts (2013: 114).

[19] This is our preliminary conclusion after members of our research team have thus far conducted interviews with ten judges in England and observed in roughly 20 days of court hearings. Throughout these observations, we have seen some examples of JCR, but this does not seem to be the norm.

4. ISRAELI JCR: IMPLICIT MOTIVATION AND RICH INFORMAL JUDICIAL ACTIVITIES

In 1992, Israel passed its first significant legislation formally introducing ADR and settlement promotion into the legal system. In that year, the Israeli Courts Act was amended to include Article 79c, which provided a clear definition of "mediation" for the first time in Israeli law and authorized the court to refer parties to mediation, to stay the legal process until such mediation was attempted, and to approve and give validity to an agreement reached through mediation. Additionally, this legislation introduced Article 79a, which enables a judge, with the parties' pre-approval, to decide a case "by way of compromise," propose a settlement to the parties or grant validity of a judicial decision to a settlement agreement reached by the parties.

In 1996, an additional significant legislative change introduced pre-trial procedures into the Civil Procedure Regulations. The new regulations (Clauses 140 and 445) established the broad discretion of judges during pretrial and listed the various actions that could be conducted during pretrial, including providing temporary relief; questioning witnesses; reviewing the submitted documents; and preparing a list of questions to be adjudicated. Additionally, the procedural rule that deals with managing the court transcript was amended to determine that in a pretrial hearing, the court may include in the transcript only the main issues discussed during the hearing, which allows judges to hold off-the-record settlement discussions within the courtroom (Israeli Court Order, Rule 68a).

The range of activities enabled by these various regulations posited the pretrial as a heuristic device within the judicial process. Indeed, from more than 200 observations that we have conducted in pretrial hearings in Israel, it is clear that Israeli judges are involved in various activities of persuasion and intervention aimed at pushing parties to settle. Among them are direct facilitation of litigotiation;[20] prediction of the legal process or outcome; ADR techniques; play between on and off-the-record conversations; and various other themes that we found and intend to probe further (Sela, Zimerman and Alberstein 2018).

In 2002, a Case Management Department (MANAT in Hebrew) was established in the Israeli court system. This department is operated by the secretary of the court and performs a variety of activities, including classifying cases; directing cases to judges according to their specialties; and directing cases to ADR processes both inside and outside the court. The current procedural framework, combined with growing caseloads and with strict and close case management monitoring, motivates judges toward an efficient disposal of cases. This formal framework opens up a wide sphere of judicial discretion in promoting settlement. It is accompanied by strong informal incentives provided by the "*net hamishpat*" system—the computerized mechanism for the management of all Israeli court cases. This system, which was introduced in 2007, provides a transparent mechanism of managing the backlog and supervising judicial work. It enables caseload to be monitored and controlled through the immediate flow of information about any individual judge to the court administration unit. From our impressions, *net hamishpat* seems to provide a very significant incentive for judges to maintain a certain ratio of settlements; as does the internal system of distributing cases among judges in each specific court.

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[20] Galanter coined the term "litigotiation" to describe "the strategic pursuit of a settlement through mobilizing the court process" (1984: 268).

Relating to this environment, in 2007 Judicial Ethical Rules were introduced into the Israeli legal system for the first time. Section 13 of these rules concerns settlement, mediation and arbitration, and provides that:

> A judge who offers a settlement, or referral to mediation or arbitration proceedings, shall not force the parties to consent, and shall ensure that the parties know that refusal of the offer shall not affect the proceedings before him.
>
> A judge shall assist parties negotiating a settlement, on the condition that in doing so he maintains the dignity of the court.

In reading the reports of the Ombudsman of the Israeli Judiciary, written after 2007, we find that more than a few complaints against judges have been filed by litigants and lawyers regarding what they considered to be strong and inappropriate pressure to settle cases. While these complaints are not always found to be justified, the question of judicial behavior in promoting settlement in the courtroom is a recurring and significant theme in these reports. In them, one can find guidance as to what is considered inappropriate pressure on parties to settle. For example, the Ombudsman has stated that a judge should never seem too eager to end a case with a settlement; should never give the parties the sense that he or she is unhappy with their decision to reject a settlement offer; should never threaten the parties with costs sanctions in relation to settlement proposals made by the court; and, in general, should avoid creating an atmosphere of pressure and compulsion when promoting settlement. Unlike the two other jurisdictions we study, it seems that in Israel, JCR activity is so rich that it has reached a level where it became necessary to regulate it through conduct rules for judges and the ombudsman for the judiciary.

In 2015, the presiding Ombudsman published a decision that had a significant impact on judicial work toward settlement in Israeli courts. According to that decision, adjudication and mediation should be maintained as separate activities, and judges should avoid performing mediation in the courtroom. Additionally, this decision states that repeated attempts to refer parties to out-of-court mediation are improper and should be avoided, as they create a sense that the court is using mediation for the sole purpose of minimizing its work in hearing the case and granting a decision. Following this decision, settlement practices in the courts have changed and today judges perform only "conciliation" attempts, rather than mediation. However, this decision only partly reflects the rich JCR activities that courts perform on the ground and that we were able to observe and document thus far (Sela, Zimerman and Alberstein 2018).

5. COMPARATIVE JCR: MAIN FINDINGS AND CHALLENGES

5.1 Summary and the Challenge of Comparing

In summarizing the mapping of the regulative system in each country, it is clear that significant differences were revealed among the three countries of research. While the three legal systems examined all deal with some degree of caseload or problems of cost and efficiency, these challenges vary in extent; and mostly, it seems that different systems choose different ways through which to confront these challenges and improve the functioning of the legal system.

Similarly, the three legal systems we studied represent different approaches to settlement, as well as to ADR, and its relation to the work of judges and the courts.

Settlement is encouraged in the three research locations through various legislative and administrative mechanisms. Judicial activity relating to settlement has been authorized and regulated in the past two decades in the three jurisdictions studied here, and includes referring cases to mediation and managing costs in England and Wales; ordering mediation and proposing settlement in Italy; and allowing active judicial interrogative work and settlement proposals in Israel, mostly during pretrial.

In a paper discussing the vanishing trial phenomenon in England and Wales, as compared with the United States, Dingwall and Cloatre provide an important warning, stating that: "It is important to be cautious about the extent to which comparable trends in countries with comparable common law jurisdictions have comparable explanations" (2006: 51). This warning applies even more strongly when one attempts to explore judges' settlement work in countries representing both different law jurisdictions and different trends with regard to ADR and the courts. Like any legal feature in any given country, questions concerning the work of judges, ways of dealing with disputes in society and the integration of ADR into the court system all depend to a great extent on the politics, economics and—perhaps most importantly—the legal culture of each country: "Modern disputing processes and institutions reflect the deeply held normative values, authority relations, and metaphysics of the society that produced them" (Chase 2005: 46; see also Shapiro 1981). It would be impossible, therefore, to attempt to provide general explanations which span the three systems and fully account for the differences between them. The following discussion is therefore a cautious preliminary reflection on the differences that we found.

5.2 Interplay between JCR in Books and in Action

We identify a curiously diverse interplay between law in books and law in action in the three jurisdictions. Some directives are utilized excessively and dramatically influence the administration of legal cases, while others are barely used. For example, in Italy, it is possible for judges to offer a settlement proposal. When used, this possibility generates a high percentage of settlement. Based on our interviews, however, this measure is barely used and the rate of trials is very high (by some indications, more than 90 percent). In Israel, a mandatory pre-mediation scheme is intended to apply to all civil cases, though in practice only a small percentage of cases are referred to this process by the court administration. In England and Wales, although judges are supposed to take an active role in promoting settlement according to Lord Woolf's report, in reality we observed a much more traditional adversarial style of judging.

In terms of the legal culture of settlement in England and Wales, explicit reforms emphasize the overriding objective of avoiding adjudication and encouraging settlement. On the ground, however, judges use less powerful means than those provided in the reforms to promote this goal. In Italy, anecdotal experiments in introducing new instruments to encourage settlement are conducted within a judicial culture of seeking to apply the law. In Israel, a rich culture of settlement has developed without an explicit formal announcement on this overriding objective, and it appears that the strongest incentive for judges' activities is provided through the courts' computerized *net hamishpat* system. Informal JCR activity is occasionally challenged through some regulative forces, but overall it has been growing rapidly in recent years. The gap between JCR in books and in action in the three legal systems suggests that looking into

formal and informal regulation as well as policy documents is not sufficient to reflect the actual appearance of JCR. In order to understand the scope of such activity, more knowledge about the legal culture in each system and the actual activities on the ground should be taken into account. Judges in countries in which settlement activities are explicitly encouraged, such as England and Wales, or formally endorsed, such as Italy, may not use them in practice. Local encouragement of settlement and ADR may significantly influence the use of JCR methods.

Incentives, such as monitoring judges' work using settlement rate as a proxy for their effectiveness, may have more influence on JCR activities than explicit procedural and other regulations and policy decelerations.

5.3 Relationship between ADR and JCR

The discussion regarding ADR and JCR seems to be framed in different ways in the three jurisdictions. In England and Wales, a series of expanded reforms meant to deal with the cost and duration of litigation was framed around the notion of "access to justice." In Italy, the introduction of a mandatory mediation scheme and various modes of JCR was part of an effort to improve efficiency and to overcome a severe case backlog, which even impacted, it was thought, on economic development. In Israel, the introduction of mediation and Section 79a was part of an effort to overcome a backlog and promote efficiency. In these three countries, and according to the 2008 European Mediation Directive, mediation is a preferred mode of conflict resolution—mostly due to the fact that it saves costs both for the parties and for the legal system.[21] Other values associated with mediation which transcend efficiency—such as the claim for more comprehensive resolutions for conflicts or relational growth—are barely addressed in the efforts to promote mediation within the court system, and are definitely not present in the promotion of JCR within the three jurisdictions.

5.4 Levels of Vanishing Trial and JCR

The background for our interest in the changing roles of judges was the phenomenon of the vanishing trial, and our preliminary quantitative studies suggest that Israel and England and Wales are different from Italy in this regard. In Israeli trial courts, we found that around 6 percent of cases reach full adjudication (Sela and Egozi 2020); and in England and Wales, it seems that 3 percent reach this stage.[22] Nevertheless, in Italy, trials are not vanishing: official reports suggest that 98 percent of cases are not settled and presumably are adjudicated. This data currently seems unreliable and rough, and some indications from the Florence court suggest a 30 percent settlement rate in certain civil cases. Still, it is clear that trials are not vanishing in Italy—probably as a reflection of its inquisitorial legal system, compared to the Israeli and English adversarial systems. Adversarial judges are supposed to encourage settlement, while inquisitorial judges strive to find the legal truth. In reality, and assuming that all systems have a mix of characteristics, we found that judges develop new roles even when the

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[21] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008, on certain aspects of mediation in civil and commercial matters, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF (last accessed August 9, 2020).

[22] UK Ministry of Justice, Civil Justice Statistics Quarterly, England and Wales: October to December 2015 (2016).

baseline of settlement rate is different. England and Wales is at the most advanced stage of such reforms, with a move to online courts impending following the Briggs report. It appears that the new ways of encouraging settlement in the three jurisdictions have impacted the roles of judges and the emergence of new JCR roles.

5.5 Inquisitorial vs. Adversarial Aspects

Judges in inquisitorial systems are supposed to decide by applying the legal code and their goal is usually framed as finding the truth through formalistic reasoning. In contrast, judges in adversarial systems are supposed to resolve conflicts by relying on what the parties choose to bring before them, while having a significant role in creating precedents and developing the law. This difference has consequences for the nature and range of JCR activities, and should be further elaborated. In Italy, which has an inquisitorial system, activities to promote settlement seem, for the most part, to be formally framed and conducted in a concrete format such as a settlement proposal. In England and Wales, the origin of adversarial systems, settlements are encouraged mostly through structuring court procedures and are expected to take place outside the court. In Israel, the inquisitorial powers endorsed during pretrial, along with an adversarial baseline characterized by a strong position of the judge and anti-formalistic judicial activism, results in a broad spectrum of judicial settlement activities. These various activities define new roles for judges and courts in the age of vanishing trials.

6. CONCLUSION

The changing landscape of legal disputes requires a new conceptual understanding of the intersection between ADR and the role of courts and judges in contemporary society. The new hybrid process described in this chapter, JCR, reflects the current interest of different legal systems in encouraging consensual dispositions of cases rather than full-blown adjudication. The chapter examined the regulative framework that enables such activity. Our study revealed significant differences among the three legal systems—Italy, Israel and England and Wales. Each system aspires to promote settlement and assigns different powers to judges in order to do so. In each jurisdiction, therefore, challenges for promoting JCR have their unique formula. In Italy, more awareness of the possibility of promoting settlement and mediation may have positive aspects on the backlog and the existing legal formalistic culture. In England and Wales, more emphasis on implementing judges' role as specified in the Woolf reform may contribute to more settlements and changes to the judicial role (although the development of online courts may continue to disintegrate the existing system). In Israel, more regulation, supervision and systematic description of the existing rich activities may be needed. Reflections on the development of the ADR movement may suggest that JCR is a new expression of ADR after 40 years of development. Mediation has not managed to replace adjudication and become the mainstream method of conflict resolution. Yet hybrid models of law, alongside legal models of mediation, have developed as part of the growing culture of settlement and the economic pressures on legal systems. In our view, studying modes of conflict resolution in the shadow of authority is therefore an important challenge for policymakers and ADR promoters in the next decade. The described JCR research is just the beginning in this important task.

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