

DESIGNING RESPONSIVE LEGAL SYSTEMS: A COMPARATIVE STUDY

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The drive for efficiency has caused many legal systems to redesign themselves, creating multiple paths for dispute resolution and incorporating settlement-promoting tools into the judicial role. However, as this study shows, legal systems have taken divergent approaches as they redesign themselves to accommodate settlement practices, leading to widely disparate results. This study probes the paths taken by three legal systems – England and Wales (common law), Israel (mixed) and Italy (continental law) – drawing on court docket analyses, courtroom observations and interviews with judges in the three legal systems. It uncovers central points of divergence: emphasized stage of dispute resolution, separation vs. combination of adjudication and settlement roles, positive vs. negative portrayal of trial, and level of individual choice. In addition, it analyzes points of convergence: an emergence of a multi-door legal landscape and the convergence of civil and criminal justice (to a different extent) in each legal system. The implications of the findings on the choices presented to litigants and their individual agency and choice are explored, and policy recommendations are offered. The study offers steps that can be taken to create more responsive, human-centered legal systems.

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I. INTRODUCTION

Before the law sits a gatekeeper. To this gatekeeper comes a man from the country who asks to gain entry into the law. But the gatekeeper says that he cannot grant him entry at the moment. The man thinks about it and then asks if he will be allowed to come in later on. "It is possible," says the gatekeeper, "but not now." At the moment the gate to the law stands open, as always, and the gatekeeper walks to the side, so the man bends over in order to see through the gate into the inside. When the gatekeeper notices that, he laughs and says: "If it tempts you so much, try it in spite of my prohibition. But take note: I am powerful. And I am only the most lowly gatekeeper. But from room to room stand gatekeepers, each more powerful than the other. I can't endure even one glimpse of the third." The man from the country has not expected such difficulties: the law should always be accessible for everyone, he thinks.

-- Franz Kafka, *Before the Law*

This Article conceptualizes the main challenges facing legal systems today regarding the judicial role. It is the result of extensive research into court reforms and judicial practices in three legal systems, England and Wales, Israel and Italy – and takes into account judicial reforms in the United States, which have often been the engine or inspiration for the reforms in these legal systems.¹ The research is based on court observations, interviews

¹ Maximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1 (2004); Maximo Langer, *Plea Bargaining, Trial-Avoiding Conviction Mechanisms*,

with judges and a quantitative analysis of court dockets.

While the three legal systems that we studied have introduced legal reforms combining efficiency concerns with the promotion of ADR – the solutions they have tailored are widely divergent. The main points of convergence and divergence give an indication of the core issues that policymakers should contend with today when contemplating the future of the judicial role.

Convergences between legal systems indicate universal trends while divergences present core dilemmas and multiple possibilities to deal with an issue. As social comparison theory relates, in the absence of an objective standard, self-evaluation often involves comparing oneself with others.² We will begin by outlining this study's uncovered divergences, as they present issues that are in many ways not a *fait accompli* – i.e., they encapsulate current dilemmas of legal systems and potential ways forward.

First, a word on the choice of the three jurisdictions. England and Wales, like many common law systems, has experienced a vanishing trial phenomenon.³ Nearly all civil cases settle (only 3% of filed cases are decided by trial);⁴ most criminal cases reach plea bargains.⁵ Israel, a mixed legal system⁶ largely based on English common law, influenced by continental law, and later by American law, has experienced a more moderate form of vanishing trial phenomenon (with 5-10% of civil cases decided by trial and 10-19% of criminal cases decided by trial).⁷ In both legal systems, to a

and the Global Administratization of Criminal Convictions, ANNU. REV. CRIMINOL. 4 (2019); Ugo Mattei, *Why the Wind Changed: Intellectual Leadership in Western Law*, 42 AM. J. COMP. L. 195 (1994).

² Leon Festinger, *A Theory of Social Comparison Processes*, 7(2) HUMAN RELATIONS 117 (1954).

³ See Marc Galanter, *The Vanishing Trial*, 10 DISP. RESOL. MAG. 3 (2004); Herbert M. Kritzer, *Disappearing trials? A Comparative Perspective*, 1(3) J. EMPIRICAL LEGAL STUD. 735 (2004) (showing that the decline in trials is not solely a U.S. phenomenon as it characterizes other common law systems); Marc Galanter, *A World without Trials*, 7 J. DISP. RESOL. 34 (2006) (mentioning examples of common law countries).

⁴ For statistics on civil cases, see UK Ministry of Justice, at <https://www.gov.uk/government/collections/civil-justice-statistics-quarterly> (last visited Jan. 6, 2021).

⁵ Surprisingly, despite the widely held estimate that the vast majority of criminal trials are disposed through plea bargains, no figures on plea bargains are presented in UK criminal justice reports. See Carol A. Brook, Bruno Fiannaca, David Harvey & Paul Marcus, *A Comparative Look at Plea Bargaining in Australia, Canada, England, New Zealand, and the United States*, 57 WM. & MARY L. REV. 1147 (2016).

⁶ Assaf Likhovski, *Argonauts of the Eastern Mediterranean: Legal Transplants and Signaling*, 10 (2) THEORETICAL INQUIRIES IN LAW, 619; Ehud Brosh, *Cutting Corners or Enhancing Efficiency? Simplified Procedures and the Israeli Quest to Speed up Justice*, 8(4) ERASMUS L. REV. 185, 186-7 (2015).

⁷ For statistics on civil cases, see Ayelet Sela & Limor Gabay-Egozi, *Judicial*

different extent, settlement is a pervasive phenomenon. Italy, a continental law country that has transplanted many components of adversarial culture, has until the past decade favored adjudication as the uncontested main conduit for disposing of cases.⁸ Yet since 2010, civil reforms have introduced new judicial settlement practices to stem the immense backlog of civil cases.⁹ Even earlier, reforms to criminal justice sought to decrease the notorious length of legal proceedings through (among others) adversarial transformation, including the use of abbreviated trials, and an adapted form of plea bargaining.¹⁰

The vanishing trial phenomenon in England and Wales and Israel, along with the relatively novel introduction of settlement culture into Italy, raises questions as to the survival, possible transformation, and meaning of the judicial role in a settlement culture. These jurisdictions are by no means unique in their promotion of settlement, which has swept through many countries around the world, but, as this study shows, they present three distinct paradigms for promoting a settlement culture. The study focused on three courts: the London County Court, the Tel-Aviv County Court, and the Florence first-instance court (*tribunal*), while exploring the broader socio-legal background and comparing findings to relevant findings elsewhere (mainly in the U.S., where there is much literature relevant to the study).

The Article will proceed in Part II by outlining the main points of

Procedural Involvement (JPI): A Metric for Judges' Role in Civil Litigation, Settlement, and Access to Justice, 47(3) J. L. & SOC'Y 468 (2020). For criminal cases, see response of the Israel Justice Ministry to a Freedom of Information Act inquiry at <https://perma.cc/TZ8B-JTVK>, stating that 81% of criminal cases ended in plea bargains in 2018 in first-instance courts. In the Tel Aviv first instance court this figure seems to be even higher according to an analysis of court dockets performed by Michal Alberstein and Dana Rosen (to be published).

⁸ Simona Grossi, *A Comparative Analysis Between Italian Civil Proceedings and American Civil Proceedings Before Federal Courts*, IND. INT'L & COMP. L. REV. 20 (2010) 213, 230 (stating, in 2010, that "settlement procedure still remains a 'dead' instrument that is rarely used by the parties... This may be due to the lack of a 'culture of settlement.' The parties to an Italian action are generally not 'educated' on the advantages of settling the case, and they prefer to go to court to take their chance on winning there."); Giovanni Matteucci, *Mandatory Mediation, the Italian Experience*, REVISTA ELETRÔNICA DE DIREITO PROCESSUAL 189, 206 (2015).

⁹ In 2009, Italy had nearly six million civil pending cases. See Paola Lucarelli, *Il Paradosso dell'Obbligatorietà del Tentativo fra Limiti e Virtù della Scelta Normativa*, in MEDIAZIONE DEI CONFLITTI. UNA SCELTA CONDIVISA (Paola Lucarelli, ed., 2019).

¹⁰ Langer, *supra* note 1. Golan Luzon, *Judicial Conflict Resolution in Plea Bargaining as the Golden Mean between the Adversarial and Inquisitorial Legal Systems* CARDOZO J. CONFLICT RESOL. 20 (2018): 597. Beatrice Coscas-Williams & Michal Alberstein, *A Patchwork of Doors: Accelerated Proceedings in Continental Criminal Justice Systems*, 22 NEW CRIM. L. REV. 585 (2019).

divergence found among the legal systems in this study. These points of divergence are central to the legal systems and have broad repercussions on the judicial role. Part III will outline the similarities and points of convergence that emerged from the research. Part IV will discuss the implications for policy recommendations, and present several recommendations.

II. POINTS OF DIVERGENCE

In studying the on-the-ground effects of judicial reforms in the three legal systems, four overarching points of divergence emerged. These points of divergence relate to core functions of the legal systems, resulting in different judicial roles and modes of case disposition. They also have an indelible effect on access to justice.

A. Emphasis on a different stage of case disposition

In England and Wales, where the vanishing trial phenomenon is acute (as explained above), the focus of the legal system is on the *pre-filing stage*, with the introduction of pre-action protocols in civil justice (and multiple prosecutorial tools to dispose of cases in the pre-indictment phases in criminal justice).¹¹ Thus, many cases are disposed without involving courts through vehicles developed by the justice system. A very small percentage (in the low single digits) of the cases that do reach court undergo Costs and Case Management Conferences and/or pretrial review. The legal system has openly called for the consensual resolution of civil disputes, incentivizing parties to settle out of court.¹² Court proceedings are portrayed as the “last

¹¹ UK Ministry of Justice, The Practice Direction for Pre-Action Conduct and Protocols states at Section 6, “Steps before issuing a claim at court: Where there is a relevant pre-action protocol, the parties should comply with that protocol before commencing proceedings. Where there is no relevant pre-action protocol, the parties should exchange correspondence and information to comply with the objectives in paragraph 3, bearing in mind that compliance should be proportionate. The steps will usually include—

(a) the claimant writing to the defendant with concise details of the claim. The letter should include the basis on which the claim is made, a summary of the facts, what the claimant wants from the defendant, and if money, how the amount is calculated;

(b) the defendant responding within a reasonable time - 14 days in a straight forward case and no more than 3 months in a very complex one. The reply should include confirmation as to whether the claim is accepted and, if it is not accepted, the reasons why, together with an explanation as to which facts and parts of the claim are disputed and whether the defendant is making a counterclaim as well as providing details of any counterclaim; and

(c) the parties disclosing key documents relevant to the issues in dispute.”

¹² Lord Woolf, ACCESS TO JUSTICE: FINAL REPORT (1996). For an overview of the new landscape of dispute settlement developing today in the U.S. and England, see Nora Freeman

resort.”¹³

In Israel, the focus of the justice system is on the *pretrial stage*, after the case is filed. On the one hand, there are hardly any pre-action mandates, so a person/entity that wishes to file a case is free to do so (with the exception of a free pre-mediation informational meeting that is sometimes required).¹⁴ On the other, according to the study's statistical analysis of court dockets, only a relatively small percentage (8.3%) of cases filed in the Tel-Aviv county court reached the trial stage and less than half of those were decided after the evidentiary phase by a verdict (due to settlement during trial). Most of the cases that are filed and not abandoned are disposed during pretrial, usually through settlement, with or without the help of the pretrial judge. The study found that cases could remain in the pretrial stage for up to six hearings. The pretrial judge may discuss the case with the litigants, yet the evidentiary phase, which constitutes the main part of a trial, is largely avoided.¹⁵ It will be interesting to see whether the enactment of the revised Rules of Civil Procedure, which include a recommendation to limit the number of pretrial hearings, affect the frequency of trial. Similarly, in the United States, cases undergo a pretrial stage before a pretrial judge, and generally the emphasis is on this stage.¹⁶ Very rarely are cases disposed by trial (under 1% of filed cases).¹⁷

In Italy, the emphasis is on the *trial stage*. Most cases do not have mandatory pre-action, with the exception of around 10% of civil cases that must undergo one introductory mediation meeting in the presence of the

Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485 (2009); Nora Freeman Engstrom, *Sunlight and Settlement Mills* 86 NYUL REV. 805 (2011). For the effect of this phenomenon on the legal profession, the employment of non-lawyers and the use of technology see Benjamin H. Barton, *The Lawyer's Monopoly-What Goes and What Stays*, 82 FORDHAM L. REV. 3067 (2013); Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. LJ 1 (2012).

¹³ UK MINISTRY OF JUSTICE, *The Practice Direction for Pre-Action Conduct and Protocols*, Section 1.9.

¹⁴ Lately, the Israel Rules of Civil Procedure were revised, reducing the value of cases (to 40,000 NIS, Section 37) in which a free pre-mediation meeting is required. This change was enacted in Jan. 2021.

¹⁵ Sela, *supra* note 6. See also Ayelet Sela, Nourit Zimerman & Michal Alberstein, *Judges as Gatekeepers and the Dismaying Shadow of the Law: Courtroom Observations of Judicial Settlement Practices*, 24 HARV. NEGOT. L. REV. 83, 126 (2018).

¹⁶ Judith Resnik, *Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement*, J. DISP. RESOL., 155, 157 (2002). ("For most cases, the pre-trial process is all there is. According to data from 2000 on the federal courts, of 100 civil cases begun, in fewer than three was a trial begun. In contrast, in 1938, of 100 civil cases filed, about twenty ended with a trial."); see also Nora Freeman Engstrom, *The Diminished Trial*, 86 FORDHAM L. REV. 2131 (2018).

¹⁷ U.S. Courts Judicial Business Report, Table C-4 (2019). <https://www.uscourts.gov/judicial-business-2019-tables> [https://perma.cc/L8FJ-4L4C]

representing attorneys, and continue to trial without undergoing a pretrial phase.¹⁸ In the past decade, judges have been given the authority to order the parties to attempt mediation, though we found that judges will usually suggest this to the parties and issue a mediation order with their consent. In addition, a large portion of cases are disposed through adjudication (42% at the Florence instance court according to our research) and around 60% of criminal cases as indicated by government figures).¹⁹

The emphasis on a different stage of case disposition reflects a differing perception on the centrality of judges in dealing with conflicts in society. In England and Wales, judges manage the margins – relatively few cases reach a judge; many do not even reach the court door. Though judges are given active case management tools, only the rare case benefits from them. According to the 2020 European Commission for the Efficiency of Justice (CEPEJ) Evaluation Report (evaluating 2018 data), there are 3.1 judges per 100,000 inhabitants, much lower than the EU average of 17.7.²⁰ In Israel, the judges have a central role in settling cases in pretrial but as evaluative settlement-promoters rather than adjudicators. Of the filed cases in the Tel-Aviv County Court, around half were disposed without a hearing (e.g., due to settlement, abandonment, default judgments) and 47% reached the pretrial judge. The centrality of judges, offset by their shortened role, may be reflected in a greater number of judges per 100,000 inhabitants – 8.2.²¹ In Italy, the judge sees the large proportion of filed cases (88-93%, due to a small percentage that are abandoned) adjudicates many of them (42%), and uses judicial settlement tools that correlate with settlement (the cases in which such tools were used were more likely to settle).²² There are 11.6 professional judges per 100,000 inhabitants.²³

¹⁸ Raffaele Aveta, *The Italian Model of Civil and Commercial Mediation*, IX ANUARIO FACULTAD DE DERECHO, UNIVERSIDAD DE ALCALÁ 221 (2016); Grossi, *supra* note 8, at 220. (“Law suits are easily filed because the threshold requirements needed to commence a lawsuit are easily met. Every pleading that meets the basic requirements under Article 163 of the ICCP and is not barred by one of the main objections – e.g., expiration of the relevant statute of limitation, lack of jurisdiction, etc. – may proceed toward a final judgment.”)

¹⁹ For civil cases, *see* Paola Lucarelli, Nofit Amir, Dana Rosen, Hadas Cohen & Michal Alberstein, *Fitting the Forum to the Fuss While Seeking the Truth* (forthcoming in OHIO STATE J. ON DISP. RESOL.); for criminal cases, *see* *Relazione sull'Amministrazione della Giustizia - Dati Statistici – Settore Penale – Distretto di Roma (Report on the Administration of Justice - Statistical Data – Criminal Sector – District of Rome)* (2018).

²⁰ European Commission for the Efficiency of Justice (CEPEJ), *European Judicial Systems Evaluation Report, 2020 Evaluation Cycle (2018 data)*, Part 2, Country Profiles, 96 (2020).

²¹ *Id.*, at 102.

²² Lucarelli, *supra* note 19.

²³ European Commission for the Efficiency of Justice, *supra* note 20, at 50.

Relatedly, the different emphasis may be related to cost of justice. Judges represent an expensive link in legal systems, and judges in England and Wales more so than judges in Italy or Israel.²⁴ The severe cuts to civil justice,²⁵ common mention of austerity in English scholarship,²⁶ and the relatively high cost of judges, seem related to the marginal role of judges in disposing of disputes. In Israel, judges are actively employed in disposing a heavy caseload; however, judges are expected to bring about settlement in the pretrial phase, reflecting a reluctance of the legal system to invest in full trials or appeals – i.e., protracted judicial involvement in the disposition of cases.

While the emphasis on an early stage is inversely related to the centrality of the judicial role, it seems directly related to an emphasis on settlement. In England and Wales, the emphasis on settlement and ADR is intense: The justice system's preference for consensual resolution has been repeated and restated since the 1998 Woolf Reforms, resulting in incentives to settle early (both in civil and criminal justice), attempt mediation, and accept settlement proposals. Highly incentivized, and at times, mandatory activity occurs during the pre-filing stage.²⁷ Parties are subject to monetary sanctions if they unreasonably refuse to participate in mediation or reject a settlement offer that is as good as or better than what they eventually receive through a verdict (i.e., if they win the case).²⁸ In Israel, where the emphasis is on the pretrial,

²⁴ *Id.*, at 50, 96, 102. The relation between the starting judicial salary and the average salary is similar in England and Wales and Israel (though in absolute numbers the salary of judges in former is much higher), yet it rises more steeply until the end of the career.

²⁵ Asher Flynn & Jacqueline Hodgson, *Access to Justice and Legal Aid Cuts: A Mismatch of Concepts in the Contemporary Australian and British Legal Landscapes*, IN (Asher Flynn & Jacqueline Hodgson. eds.) ACCESS TO JUSTICE AND LEGAL AID—COMPARATIVE PERSPECTIVES ON UNMET LEGAL NEED 6 (2017); Hazel Genn, *What is Civil Justice for - Reform, ADR, and Access to Justice*, 24 YALE J.L. & HUMAN. 397 (2012)

²⁶ John Sorabji, *Austerity's Effect on English Civil Justice*, 8 ERASMUS L. REV. 159 (2015). Xandra Kramer & Shusuke Kakiuchi, *Austerity in Civil Procedure and the Role of Simplified Procedures*, 8 ERASMUS L. REV. 139 (2015); Carlo Vittorio Giabardo, *Should Alternative Dispute Resolution Mechanisms Be Mandatory: Rethinking Access to Court and Civil Adjudication in an Age of Austerity*, 44 EXETER L. REV. 25 (2017); Mike Hough, *Procedural Justice and Professional Policing in Times of Austerity*, 13 (2) CRIMINOLOGY & CRIMINAL JUSTICE 181 (2013).

²⁷ UK Ministry of Justice, *supra* note 11.

²⁸ See NEIL ANDREWS, THE THREE PATHS OF JUSTICE: COURT PROCEEDINGS, ARBITRATION AND MEDIATION IN ENGLAND (2012). In *Dunnett v. Railtrack* [2002] 1 WLR 2434, CA, the appeal court held that the rail track company, which had successfully defended the claim, both at trial and on appeal, should be denied its costs due to its decision not to attempt mediation. See also Hazel Genn et al., *Twisting Arms: Court Referred and Court Linked Mediation under Judicial Pressure*. MINISTRY OF JUSTICE RESEARCH SERIES 200, 205 (2007) (commenting that *Dunnett v Railtrack* created higher demand for mediation: "This case confirmed the power of the courts under the CPR to deny a successful party in

settlement is a central focus of judicial activity in addition to traditional ADR avenues. In the Tel-Aviv first instance court, settlement often occurred through hands-on judicial involvement in the substance of the case, sending a message that settlement was the preferred choice. While settlement is not a declared aim of the legal system, mandatory free informational mediation meetings to explore the prospect of mediation are becoming increasingly common. In Italy, certain types of civil cases (around 10% of all cases) are required to undergo a mandatory mediation meeting with the participation of lawyers, thus increasing expenses. Other cases can go directly to trial. In our study, we found that in the Florence Court around 50% of filed cases settle (less than in Israel or England and Wales but still a substantial portion), independently or following the use of specific judicial tools (further described in the next section). Settlement is usually not pressed upon the parties.

Placing the emphasis on the *pre-filing stage* through mandatory or highly incentivized actions, may leave litigants outside court gates against their will. Indeed, one of the main criticisms of the reforms in England and Wales pertains to the frontloading of legal costs due to pre-action protocols, in effect leaving disputants without recourse to courts or leading them to represent themselves (usually unsuccessfully).²⁹ Due to the dearth of alternatives that actually incorporate dialogue and consensual values (court-annexed mediation is often evaluative and can involve a shuttling between parties who sit in different rooms),³⁰ placing the emphasis on the pre-filing stage may leave disputants with little in the way of addressing the substance of their dispute.³¹ Placing an emphasis on the *pretrial* stage, as in Israel, allows

litigation their legal costs if they are deemed to have acted unreasonably in refusing to attempt to settle their dispute by mediation...”)

²⁹ See Penny Darbyshire, *Civil Case Management: Can Lessons Be Learned from Wales and England?* Paper presented to the Judicial Institute of Scotland, April 27-8, 2015. (“Most litigants in Wales and England are litigants in person (LIPs) and their proportion will increase”) <https://eprints.kingston.ac.uk/id/eprint/33452/3/Darbyshire-P-33452.pdf> [<https://perma.cc/6SFY-VYGD>]; Sorabji *supra* note 26.

³⁰ Simon Roberts, *A COURT IN THE CITY: CIVIL AND COMMERCIAL LITIGATION IN LONDON AT THE BEGINNING OF THE 21ST CENTURY* (2013); CEDR, *AUDIT REPORT* (2018), (noting that mediators’ self-report of their styles differs according to the stage of mediation, ranging from facilitative to evaluative: “[M]ediators trained in a facilitative doctrine tend to favour that approach and start out using it, but many (although clearly not all) veer towards more evaluative strategies when the going gets tough.” The report also notes ‘an increasing resistance to joint meetings, particularly at the start of a mediation day. This resistance appears to be largely driven by lawyers...’) https://www.cedr.com/wp-content/uploads/2020/01/The_Eighth_Mediation_Audit_2018.pdf [<https://perma.cc/XU7R-PRN4>].

³¹ In England and Wales, ombuds in consumer disputes have become common, along with the longtime presence of public ombuds who have limited power to implement their recommendations. See Naomi Creutzfeldt & Ben Bradford, *Dispute Resolution Outside of Courts: Procedural Justice and Decision Acceptance Among Users of Ombuds Services in*

disputants entry to the courthouse but they remain in the hallway, with a gatekeeper (the pretrial judge) guarding the door to trial. Issues affecting individual choice will be further explored in Section D.

B. Separation vs. combination of adjudicatory and settlement functions

While all three legal systems promote settlement and ADR (to a varying extent), they position the judge differently in their implementation. Does the judge retain a primarily adjudicative role? Or is the judge a settlement-maker, even mediator, and to what extent?

Legislation in the three legal systems allows judges to help parties settle the case.³² However, on the ground, there are few commonalities in this respect. In England and Wales, a top priority of the legal system is the reduction of notoriously high litigation costs to enable disputants to access justice when needed (in line with the Woolf and Jackson reforms). The judge is positioned to reduce these costs in Costs and Case Management Conferences, where judges oversee planned litigation costs, deciding in advance on the costs that will be recoverable, and manage the schedule for the trial. Often they may prompt parties to agree on one expert, while considering the reduction of the number of witnesses, and determining whether placing a senior lawyer on the case is justifiable and proportionate. In our observations, judges decided on these issues themselves or encouraged the parties to reach an agreement, sometimes leaving the room to let them talk. We did not see judges actually dealing with the substance of the case to promote conciliation, but rather they were dedicated to bringing down the cost of litigation and creating a clear schedule for the life of the case. In addition, the style of judges varied, some judges having a more conciliatory tone than others. With few exceptions,³³ judges focused on the costs and schedule. Judges in England and Wales may call upon the parties to attempt mediation,³⁴ but *do not usually integrate mediation into their own roles*. Another judicial settlement practice, which is used sparingly but may gain traction with a precedent that has made it acceptable if one party requests it

the UK. L.& SOC'Y REV. 50(4) 985 (2016).

³² Section 3 of England and Wales' Civil Procedure Rules; Articles 140 and 445 of the Israel Rules of Civil Procedure; Articles 185 and 185*bis* of Italy's Civil Procedure Code.

³³ One highly conciliatory judge referred to the hearing as a "conversation," spoke directly to the claimant and defendant, though they were represented, remarking that "lay people often want to sort things out," and that after receiving a better impression of the merits of the case (he had asked the attorneys questions about the case during the conference while determining costs and schedule) they were better placed to attempt mediation.

³⁴ Simon Roberts, *'Listing Concentrates the Mind': the English Civil Court as an Arena for Structured Negotiation*, 29 (3) OXFORD J. OF LEG. STUD. 457, 467 (2009) ("This case cries out for mediation"). In our observations, judges did not do so often.

and the other objects,³⁵ is early neutral evaluation (ENE), in which the judge provides the parties with her initial impression of the case and evaluates its merits. As this function is an abbreviated adjudicative function (the judge is asked to “decide” on the case so that the parties can settle more easily), it does not significantly destabilize the separation between adjudicatory and settlement functions. The occasional call upon parties to attempt mediation also does not affect this separation as it directs cases outside the court for mediation.

In Israel, where the pretrial judge is centrally situated to bring about settlement, numerous judicial settlement practices were found in the Tel Aviv first-instance court, and the judge’s conciliatory and adjudicative functions are for the most part *fully integrated*. The judge takes an active part in the negotiations between the parties, and often goes into the substance of the case when doing so, pointing out the weaknesses of the case and the risks faced by each party while encouraging them to settle. The judicial conflict resolution (JCR) practices are for the most part narrow, rather than broad practices that one would associate with facilitative or transformative mediation, addressing the underlying needs of the parties. Since the pretrial judge is the same judge that presides over the case if it continues to trial, the parties might feel pressured to do as she says. In addition, the efficiency of judges is largely evaluated as a function of the number of cases that they close (court docket information is widely available), so they may be under pressure themselves to dispose cases.³⁶ This role is reminiscent of that of the pretrial judge in the U.S., who employs a variety of settlement promoting tools, with a major distinction: U.S. judges³⁷ can meet with parties separately and privately, caucusing with parties, with or without their lawyers.³⁸ This

³⁵ *Lomax vs. Lomax* [2019] EWCA Civ 1467.

³⁶ Net HaMishpat is an electronic database of all legal files (used for case management and data collection) that allows for searches and is accessible to lawyers. With authorization, access is granted to researchers and the general public).

³⁷ Including magistrate judges, who conduct pretrial hearings, but do not preside on trials. For an overview of the unique role of magistrate judges in the U.S., see Daniel W. Hamilton and Main Thomas, *Introduction: Magistrate Judges and the Transformation of the Federal Judiciary* 16 NEV. L.J. (2016) 2; Nancy A. Welsh, *Magistrate Judges, Settlement, and Procedural Justice*, (2016) 983.

³⁸ William P. Lynch, *Why Settle for Less: Improving Settlement Conferences in Federal Court*, 94 Wash. L. REV. 1233, 1240 (2019) (“Settlement conferences are held off the record, and many judges hold a joint initial session with all parties before beginning separate ex parte conferences with each side. At the settlement conference, judges may use methods associated with facilitative mediation, in which a mediator does not express to the parties an analysis or evaluation of the case and helps the parties find their own resolution to the dispute. However, they also may use traditional evaluative techniques and attempt to push the parties towards settlement.”); John C. Cratsley, *Judicial Ethics and Judicial Settlement Practices: Time for Two Strangers to Meet*, 21 OHIO ST. J. ON DISP. RESOL. 569, 573-

increases judges' variety of techniques, and enables them to persuade parties to disclose information they might not otherwise disclose.³⁹ However, this same freedom makes the presiding of judges over the case in trial if settlement efforts fail controversial (whether the settlement judge can preside on the case varies in and among courts).⁴⁰ The information disclosed during caucusing may be more extensive than that which would be presented at trial, among other reasons, leading some scholars to suggest that the pretrial judge should not preside over trial.⁴¹ In other words, they propose a *separation between settlement and adjudicative powers, in the form of two separate judges* on the case – the pretrial judge, who engages in negotiation and settlement practices, and the trial judge, who engages in adjudication. (The same judge may alternate between being a settlement judge during pretrial in one case and an adjudicative judge during trial in another.)

In Italy, judges of the Florence Court, where a collaboration was established with the University of Florence, legal interns trained by the university pre-screened cases to deduce whether they seemed appropriate for mediation, giving their reasoned recommendation to judges in advance of hearing the case. During the hearing, judges decided whether to propose mediation to the parties, issuing a mediation order when the case seemed suitable, and giving their reasoned decision in the mediation order, regularly modifying the recommendations of the intern. This model is being replicated by other courts in the country.

Judges in Italy have also received authority to issue judicial conciliation proposals; we found that they do so only after determining the legal liability of the parties. In an interview, one judge even commented that by the time he was ready to make a proposal he was ready to write a judicial decision. According to the judges, their conciliation proposals were identical to what they would have decided on the case. In one instance, after expressing disappointment that the parties had not provided an expert report, the judge explained: "I cannot make a conciliation proposal right now, because I do not have enough information." The fact that the parties are not usually present (only lawyers) may be one reason for the lack of substantive intervention in the case to help them conciliate. Judges can order parties to be present by

74 (2006) (the Code of Judicial Conduct allows judges, with the consent of the parties, to engage in ex parte communications).

³⁹ Cratsley *supra* note 38 at 578-9 lists a variety of settlement practices used by judges. See also Marc Galanter, *A Settlement Judge, not a Trial Judge: Judicial Mediation in the United States*, 12 J.L. & Soc'y 1 (1985) (for a variety of techniques judges say that they use).

⁴⁰ Roselle Wissler, *Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences*, 26 OHIO. ST. J. ON DISP. RESOL. 271, 272-3 (2011) (noting that this can vary from court to court and within a court).

⁴¹ Ellen E. Deason, *Beyond Managerial Judges: Appropriate Roles in Settlement*, 78 OHIO ST. L.J. 73 (2017). 114-5; Lynch, *supra* note 38. Cratsley, *supra* note 38.

convening a conciliation hearing, yet rarely do so (3.4% of cases according to the study's court docket analysis), and in one such case that we observed the judge seemed to lack conciliatory skills, persuading the reluctant claimant to settle by stressing costs and time (rather than going into the substance of the case to try to bring the parties closer to settlement). Since the judge that conducts the conciliation hearing is the same judge that presides over the case, as in Israel, parties might feel compelled to agree to the entreaties of the judge.⁴² Yet in Italy judges for the most part retained their adjudicative function and directed cases that seemed appropriate to mediation agencies. Thus, Italian judges “fit the forum to the fuss,”⁴³ adjudicating the case or referring it to mediation, or asking the lawyers if they have negotiated, and encouraging them to settle, but not usually taking an active part in negotiating or mediating the case themselves, and for the most part maintaining the *separation between adjudication and settlement*. In fact, following the semi-coaching provided by legal interns with extensive mediation education, judges (whom we observed and others we interviewed) preserved mediation for parties whom they felt were in need of a conversation very different from the one encouraged within the legal process.

C. Positive vs. negative portrayal of trial

An interesting phenomenon that diverged between the legal systems was their portrayal of trial. The legal system in England Wales, through reports, Supreme Court decisions and legislation, views legal proceedings as a last resort, occurring when parties have failed, despite all institutional incentives, to reach an agreement.⁴⁴ Even when the claim is justified and precedential, claimants may have to bear cost penalties if they did not agree to a settlement

⁴² For the risk of coercion involved in a settlement proposed by a judge presiding over the case, see Deason *supra* note 41; Charles B. Craver, *Establishing a Cooperative Environment*, 26 JUDGES J. 42 (1987); Jaclyn Barnao, *In Pursuit of Settlement: Deciphering Judicial Activism*, 18 GEO. J. LEGAL ETHICS 583 (2005).

⁴³ To use the phrase coined by Frank E.A. Sander, who envisioned a legal system that channels each case to its optimal mode of disposition. See Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49, 68 (1994).

⁴⁴ See Genn, *supra* note 25; for an analysis on the way to balance adjudication and proportionate costs, see Neil Andrews, *On "Proportionate" Costs*, UNIVERSITY OF CAMBRIDGE FACULTY OF LAW RESEARCH PAPER SERIES, Paper 22/2014 (2014). For the perception of trial as a mistake or a failure in the U.S., see Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 261 (1995) (expressing concern at the prospects of trial being considered “a pathological event”); Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 108 (1994) (stating that many scholars believe “trials represent mistakes”).

proposal that is higher or equal to that obtained in the final verdict. If they unreasonably reject a request for mediation by the other party, they may also be penalized, depending on whether their rejection was reasonable (whether it is reasonable is subject to judicial interpretation and may change according to the circumstances of the case).⁴⁵ However, this widely publicized negative view of the option of trial may make it easier for judges themselves to be neutral on this point during court proceedings. The fact that judges do not have to stem a large inundation of cases due to pre-action protocols and the high cost of litigation may also contribute to a neutral stance. Costs and Case Management hearings – the first and sometimes last opportunity a judge has to dissuade parties from pursuing trial – could have been used to portray trial negatively, but in the cases that we viewed judges focused on costs and scheduling issues that were disputed between the parties, usually retaining a neutral demeanor. The control of costs and scheduling is itself a neutral undertaking, as it provides information needed to reach a settlement on the one hand, and may make trial more accessible by the lowering of costs and duration of trial on the other.⁴⁶

In Israel, where the legal system does not publicly state a preference for settlement, and where judges are situated at a main junction where the majority of cases that are not abandoned proceed, judges take an active role in encouraging (even sometimes pressing) parties to settle. They regularly refer to the heavy price of trial in terms of costs, time and emotional turmoil when doing so. Like a salesman deriding his wares, judges may try to persuade parties to opt out of trial. Every so often a party may protest that it wants justice, resulting in a Kafkaesque situation.

More often, judges in the Tel-Aviv first-instance court presented the weaknesses of each party's case to help parties settle. This might be of great benefit to litigants who have come to pretrial for that purpose. However, for litigants who are uncertain of the best way to proceed or believe trial is their best option, a judicial preference for settlement may be problematic. The preference of judges negatively bias their evaluation of cases. In other words, it may result in a negative portrayal of the case of the party that seems less willing to settle or of both parties' claims. Indeed, in one case, when telling

⁴⁵ UK Ministry of Justice, Practice Direction – Pre-Action Conduct and Protocols, Para. 8.11: "...A party's silence in response to an invitation to participate or a refusal to participate in ADR might be considered unreasonable by the court and could lead to the court ordering that party to pay additional court costs."

⁴⁶ However, in conversation outside of court, judges may express a critical view of adjudication, see Elizabeth G. Thornburg, *Saving Civil Justice: Judging Civil Justice*. By Hazel Genn., 85 TUL. L. REV. 247, 247 (2010) ("...legal elites disparage litigation – including the unseemly tendency of judges themselves to suggest that adjudication is overpriced and unreliable, and no more worthy than any other method of resolving disputes.")

the plaintiff clearly that his case was weak, the apparent satisfaction of the other party was immediately tempered by the judge, who was quick to explain that the defendant still had risks. This balancing act recurred in many cases and may not be a neutral indication of how the case would proceed had it continued to trial. Since the pretrial judge resides on the case if it continues to trial, the judge's assessment of the case carries great weight.⁴⁷

Telling each party the weakness of its position may discourage parties who have a strong case or a strong defense from continuing to trial. This might be to their benefit at times, since trial is wrought with uncertainty and carries a price, but perhaps one should not disqualify the empowering aspects of trial when it confirms that one has been wronged or has behaved justly. Or its benefits in helping other parties settle by clarifying norms or setting precedent. Most judges would say that they do not knowingly create such a bias, but admit that settlement is their goal.

The blurred boundaries between adjudication and mediation and the active role of Israeli judges in promoting consent are further reflected in Supreme Court decisions praising the notion of compromise and the pursuit of settlement.⁴⁸ Compromise is presented as a form of justice, both in the courtroom and in interviews, and settlement becomes not just a private agreement between parties that promotes efficiency but rather a public social ideal to nourish and develop.⁴⁹

In Italy, where the general view towards adjudication is positive – settlement-promoting tools were introduced into the judicial role only in the past decade or so – Italian judges did not portray adjudication in a negative light, but rather pointed to the benefits of mediation when the case seemed appropriate. In interviews, they also had a positive view of trial. It seems that the positive view toward trial may also result in “an even better” portrayal of mediation when it seems appropriate for the case (presented as the more appropriate of two satisfactory options). Indeed, in one case, the lawyers asked the judge for some more time to negotiate, but the judge said the case was more appropriate for mediation, and referred it to mediation. We observed a negative portrayal of trial only in one case, in a conciliation hearing that we witnessed (as mentioned above, the conciliation hearing, which combines adjudicatory and settlement functions is rarely used). It seems that when judges are called upon to conciliate – to depart from their

⁴⁷ This negative portrayal of the pretrial can also be true for U.S. pretrial judges. See Judith Resnik, *supra* note 16, at 158 (“Judges repeatedly opine that ‘a bad settlement is almost always better than a good trial.’”). Settlement conferences in the U.S. are not public; it would be interesting to probe how the negative view is expressed to parties.

⁴⁸ See for example CA 1639/97 *Ageapolis Ltd. v. Custodia Internazionale di Terra Santa* (per Justice Ilan) (1999).

⁴⁹ See Itay Lipschutz, *Bitzua' and 'Pshara' – Three Possible Interpretations*, DINEI ISRAEL 431 (2016) (Hebrew).

traditional adjudicative role and to induce parties to settle – they are not always equipped well enough to do so and may revert to a negative portrayal of trial rather than focus on bridging the divide between the parties.

D. Level of Individual Agency and Choice

Level of individual choice refers to the components affecting the ability to choose the procedure that will be used for one's dispute.⁵⁰ It is important to distinguish between litigants that are repeat players (banks, insurance companies, government agencies) and litigants who are individuals (human litigants). Most of the lawsuits that individual litigants are party to include a non-individual player.⁵¹ Unlike repeat players, which often have ample accumulated data to reach optimal decisions, individual litigants lack the experience and resources to obtain such data. Even with the help of an attorney, individual litigants often do not have access to information on possible case trajectories and the projected consequences of their choices.

Some central factors influencing individual agency and choice differed between the three legal systems. It is important to note that the tension between individual agency and collective interests is inherent to democracies, such that individual agency is balanced with other social considerations.⁵² In addition, individual choice can be manipulated (by default biases, etc.).⁵³ With these caveats in mind, individual choice and agency are often considered core values of democracy, allowing for a sense of participation and bestowing legitimacy upon public institutions.⁵⁴ The lack of them spurs masterpieces of despair, such as those of Kafka and Camus, denoting government as an arbitrary entity detached from the individual, and based on power rather than on legitimacy. Some requirements must be met to enable choice making, and the level of their fulfillment differed among the studied legal systems. The following is by no means an exhaustive list, but rather a

⁵⁰ Donna Shestowsky, *Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549 (2008).

⁵¹ According to our study, only 7% of cases in the Tel-Aviv first instance court included a claimant and a defendant who were individual litigants; 58% included an individual litigant and a non-individual litigant; 35% included only non-individual litigants.

⁵² Linda Mulcahy, *The Collective Interest in Private Dispute Resolution*, 33(1) OXFORD J. LEG. STUD. 59 (2013); David Beetham, *Theorising Democracy and Local Government*. IN RETHINKING LOCAL DEMOCRACY (King D., Stoker G., eds., 1996).

⁵³ Richard H. Thaler, Cass R. Sunstein, & John P. Balz, *Choice Architecture*, THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY 428 (2013).

⁵⁴ Sherry R. Arnstein, *A Ladder of Citizen Participation*, 35(4) J. AM. INST. OF PLANNERS 216 (1969). Barnao *supra* note 42 at 593 ("Although aggressive techniques might convince a wary party who is being unrealistic about the chances of their case on the merits to settle, it may not leave that party satisfied with the justice system in general because they felt pressured into making such a decision.")

portrait of main research findings.

1. **Transparency.**

The ability to make informed choices requires transparency regarding the different options, including expected trajectory of cases, the rate of settlement according to case type, and, when possible, the content of agreements (which can be anonymized) reached in mediation or approved by the court. In all three legal systems, the study faced transparency challenges, but to a very different extent. The study was able to bridge some information gaps through a mixed-methods approach (interviews, court observations and a statistical analysis of court dockets based on manual coding). Repeat players such as banks and insurance companies may also find ways to surmount transparency challenges by influencing and tracking the outcomes in their own cases. Yet the individual disputant does not have the resources to do so.

Data on clearance rate (the number of resolved cases divided by the number of incoming cases for a given period)⁵⁵ and disposition time (defined as the total number of pending cases at the end of an observed period divided by the number of resolved cases during the same period multiplied by the number of days – 365)⁵⁶ in Italy and Israel are available through CEPEJ⁵⁷ and national data, yet this information is not relevant or specific enough for a prospective litigant standing before the law trying to calculate her choice. They do, however, give an indication of the efficiency of legal systems. These statistics are lacking for England and Wales; officials of England and Wales have justified the lack of cooperation with CEPEJ's rating system as an objection to a "one-size-fits-all" justice system.⁵⁸ However, it is difficult to see how lack of available information to the general public in England and Wales can be similarly justified. In Israel, electronic docket information regarding cases is available to the legal community (we received access after our request was approved), along with the ability to digitally search files, yet it proves highly inaccurate. Many disposition codes are ambiguous; the reported error rates in the codes that are most relevant to settlement are as

⁵⁵ For more on this definition, see European Commission for the Efficiency of Justice (CEPEJ), Report No. 24, 177 (2016).

⁵⁶ *Id.*, at 178.

⁵⁷ *Id.*

⁵⁸ EU Observer, *EU Justice Scoreboard Upsets Some Member States*, (March 17, 2014) <https://euobserver.com/justice/123507>

high as 70%,⁵⁹ and there are observable disparities in case outcome data.⁶⁰ Moreover, the available data do not always provide a comprehensive picture regarding the scope and nature of court action in each case, especially cases that have terminated without trial (thus we performed a statistical analysis, going into the files and coding data). In Italy, the computerization of courts does allow for the gleaning of data regarding disposition of cases, judicial interventions and settlement rates in each court. Cases that we examined in the Florence Court consisted of scanned files that required manual coding to obtain such information (no search function was possible). Data on ratio of judges' settlement rate were not publicly available. In England, published civil and criminal justice reports, much relevant data were missing (even the rate of plea bargains, despite general agreement among scholars that plea bargains are the main mode of disposition of criminal cases), and when attempting to receive this data from the justice ministry, we and our colleagues in England and Wales ran into a lengthy bureaucratic process, at the end of which much of the requested information was not made available; aggregated information and relevant information on hearings and judicial activities were not provided.

Supplementing the accessibility problem to the electronic legal file and to aggregated relevant data on settlement rates in reference to judicial intervention and case stage in all three jurisdictions, another transparency problem was uncovered. Within the three jurisdictions, although data on mediation was usually more accurate and the information transparent, no integration of the data accumulated by mediation centers or coordination existed. In Italy, mediation centers provided data on the number of cases referred to them, the rate of refusal to continue mediation and the rate of successful agreements.⁶¹ In Israel, the court administration's coordinator of pre-mediation meetings (Mahut) issues annual reports on the program's success while providing the same data as the Italian centers. In England and Wales, CEDR, the mediation agency authorized by the Ministry of Justice to

⁵⁹ See, e.g., Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMP. LEG. STUD. 705 (2004). Similar error rates were found with respect to electronic docket data in Israel, see Keren Winshall Margal, Talya Yehuda & Aviv Shirtz, *Reliability of Case Filing and Disposition Data in Net-Hamishpat Electronic System* (2001), ISRAELI SUPREME COURT RESEARCH DIVISION, <http://elyon1.court.gov.il/heb/Research%20Division/doc/Research3.pdf> [<https://perma.cc/3A5M-BU5F>] [in Hebrew].

⁶⁰ For an extensive description of this problem and the ways the research team has coped with it, see Sela et al., *supra* notes 7 and 15. Cf. Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 NOTRE DAME L. REV. 1455 (2003).

⁶¹ See, e.g., reports to the European Parliament by ADR Center, Rome. <http://adrcenterinternational.com/publications/> (last visited, Jan. 22, 2021)

administer mediation for the London County Court, provides audit reports every two years with this information along with mediator and lawyer views of mediation. Despite the centrality of mediation as an alternative to adjudication in all three jurisdictions, mediation outcomes (e.g., anonymized agreements) and an account of the process through which they are achieved are unavailable. Official records in court dockets do not provide information on the use of mediation (save sporadic reports on mediation disposition of files). This would provide a comprehensive picture of the actual potential of mediation and the on-the-ground interaction between mediation and the courts.

This lack of information, and especially regarding the expected outcome for each choice and prospects of reaching the trial stage, may create disparities for individual litigants, who cannot gather this information by themselves. It can also provide a false picture of the court's real engagement and overload.⁶²

2. **Costs.**

In England and Wales, trial is still considered an option “for the very rich or the very poor”⁶³ (the latter having access to legal aid). One of the focal points of legal reforms there was lowering costs of litigation to enable access to justice. This was to be achieved through placing an emphasis on proportionate costs (litigation costs that are proportionate to the value of the claim) overseen by a judge with active case management tools.⁶⁴ In our observations, judges took this task seriously, often cutting costs by reducing the number of witnesses, experts, or level of seniority of the legal representative of the case (calling for a junior level advocate). However, costs of litigation still remain very high, and it is widely agreed that they have not

⁶² For example, there is a common claim the research team heard from the previous director of the court administration in Israel, about one million of cases filed each year in Israeli courts and treated by the judges, yet if only half of the cases filed ever see a judge this claim may be challenged.

⁶³ HEILBRON-HODGE REPORT, CIVIL JUSTICE ON TRIAL - A CASE FOR CHANGE (1993), quoted in Woolf, Lord, ACCESS TO JUSTICE: INTERIM REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES, 4 (1995). See Darbyshire, *supra* note 29 (commenting on the impact of the reforms, “What was not achieved was a reduction in cost, because of front-loading of preparation and the exchange of information, plus the satellite insurance costs and success fees of no-win no-fee agreements which replaced most of civil legal aid. Sadly, the rules did not include Woolf’s plan for fixed costs in the fast track. Lord Justice Jackson said in 2011 that the English and Welsh costs regime was “the laughing stock of the world” so I think some of these problems are peculiar to England.”)

⁶⁴ Implemented in the Civil Procedure Rules, Section 3. See Darbyshire, *supra* note 29 (“In most cases, there is a massive imbalance of power between the parties. Therefore, to ensure speed and fairness, the court must manage cases strictly and speedily, and not leave it to the powerful party to exploit the weaker party by failing to cooperate, using delaying tactics, and racking up costs.”)

been reduced, due to a frontloading of costs to fulfill pre-action requirements. Thus most disputants who do choose trial are unrepresented.⁶⁵ For the most part, they present their cases weakly, requiring the intervention and help of the judge to fulfill basic court requirements.⁶⁶ In the observations that we conducted, unrepresented litigants seemed oddly out of place, outsiders to the law in a legal setting.

In Israel and Italy, efficiency (i.e., managing the caseload with speed) rather than costs is the center of attention. Costs are not perceived as a barrier to litigation in academic scholarship or public discourse, and parties have access to courts, as evidenced by large caseloads. Yet continuing to trial from pretrial may not be cost-effective, as the median case value in the Tel Aviv first-instance court was only around 25,000 NIS. Whether the parties have the financial means to continue from pretrial to trial in Israel is a question that should be explored; the fact that litigation costs have not garnered much attention seems to imply that they are not prohibitive – or that the prevailing rhetoric does not explore this issue.⁶⁷ In addition, judges seem to take into consideration power imbalances between parties when deciding upon whom to level costs (e.g., an individual vs. a corporation).⁶⁸

3. **Emphasized stage, mandatory processes.**

As explained above (Section A), the legal systems differ in the emphasized stage of the legal process, and a pre-filing emphasis can include mandatory processes that require investment of time and cost, making trial less practical. Mandatory or highly incentivized (i.e., possibly incurring cost sanctions if refused) mediation may encumber parties to the point that they settle, not because they have had a fruitful dialogue but rather because trial has been too difficult to attain. Mandatory mediation may in some cases “save parties from themselves,” preventing a long, painful trial;⁶⁹ in others it is a source of tactical information gathering. In Israel, mandatory pre-mediation information hearings (Mahut) after filing (for cases above a certain sum) many times become a stage in the adversarial pursuit of trial.⁷⁰

⁶⁵ *Id.* See Rabeea Assy, INJUSTICE IN PERSON: THE RIGHT TO SELF-REPRESENTATION (2015); Sorabji, *supra* note 26.

⁶⁶ Assy, *supra* note 65.

⁶⁷ As indicated in Issi Rosen-Zvi, *Decentralization of the Judicial System in Israel: The Hidden Role of Civil Procedure Regulations*, MISHPATIM 717, 728 (2018) (Hebrew).

⁶⁸ Theodore Eisenberg, Talia Fisher, & Issi Rosen-Zvi, *When Courts Determine Fees in a System with a Loser Pays Norm: Fee Award Denials to Winning Plaintiffs and Defendants*, 60 UCLA L. REV. 1452 (2012).

⁶⁹ Most poignantly in family cases (which are not examined in our research), to enable a more collaborative approach, especially if conducted before the filing of the case.

⁷⁰ Dan Yishayahu, *Perspectives of Lawyers and Mediators in Israel on Pre-Mediation Effect* (in Hebrew, in file with the authors), M.A. thesis submitted to the graduate program on Conflict Management, Resolution and Negotiation.

Yet trial can be made more effective and thus less painful through active judicial case management, as seems to be the case in England and Wales, where trials are scheduled for one day in the fast track and usually a few days up to a week in the multi-track. In Israel parties are able to present their case in court if they so wish – usually in pretrial. In other words, they are for the most part free to “have their day in court” but will be encouraged (or pressed) to settle the case. A wide range of judicial tools to bring about settlement include judicial arbitration (judicial evaluation and settlement of the case by way of compromise, without the writing of a fully reasoned decision), litigotiation and referral to mediation.⁷¹ Thus the gate to trial is almost closed and reserved only for the most determined litigants and the path *to higher instances of appeal* is effectively blocked (even if a pretrial judge gives a decision through judicial arbitration, this decision usually cannot be appealed, as the judicial arbitration was agreed upon by the parties and the decision is not sufficiently reasoned to enable appeal).⁷² In Italy, apart from a mandatory introductory mediation meeting for around 10% of civil cases, parties are free to choose the mode of dispute resolution for their case. However, the legal proceedings are relatively lengthy. Length of trial also has implications for individual agency and choice.⁷³ Delay tactics by parties with deep pockets can cause weaker parties to desist from trial and settle because they are in need of a final decision.⁷⁴ In the past, Italy was condemned by the European Union time and again for the length of trials,⁷⁵ probably influencing its introduction of civil reform, including mandatory mediation and judicial settlement tools, in 2010.⁷⁶

⁷¹ Sela, *supra* note 15.

⁷² Issi Rosen-Zvi, *supra* note 67 (stating that the legal system has become decentralized and decisions are now made mainly in the lower courts due to judicial case management and stricter restrictions on appeal). <https://lawjournal.huji.ac.il/article/12/1379> [<https://perma.cc/6XB2-M2FG>].

⁷³ Article 6 of the European Convention of Human Rights: “Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

⁷⁴ Darbyshire, *supra* note 29.

⁷⁵ For instance, in 1999 the Grand Chamber of the European Court found in several cases (*Ferrari, A.P., Di Mauro, and Bottaziv v. Italy*) that the systemic delays in the Italian judicial system constituted an administrative practice that was incompatible with the Convention. In 2004, the court found in the case of *Apicella v. Italy* that the compensation provided by Italy for undue length of proceedings was “derisory.” For more recent examples, see European Commission for the Efficiency of Justice (CEPEJ), *Length of Court Proceedings in the Member States of the Council of Europe Based on the Case Law of the European Court of Human Rights* (2018) <https://rm.coe.int/cepej-2018-26-en-rapport-calvez-regis-en-length-of-court-proceedings-e/16808ffc7b> [<https://perma.cc/RZ7W-BTRH>].

⁷⁶ Michele Taruffo, *Ideologie e Teorie della Giustizia Civile*, in 247 *Revista de Processo*, (2015). For background on the lack of a mediation culture in Italy, see Giuseppe Conte, *The*

4. The alternatives to trial.

While the focus of this study was the judicial role in an age of settlement and the processing of cases in court, it is important to note that individual agency and choice is affected by the quality and accessibility of alternatives to trial. As mentioned in Section A, the emphasis on the pre-filing phase in England and Wales correlates with an emphasis on settlement and ADR. Court-annexed mediation, while often a bargaining process, is subsidized, and mediation is accessible by phone. Arbitration, which due to cost, will usually not be a preferred choice upon individual litigants (though they may participate in arbitration due to arbitration clauses in contracts), offers a relatively complete solution, as arbitrators are allowed to issue interim injunctions. This strengthens arbitration by preventing manipulation of arbitration proceedings by the parties or rendering arbitration toothless. It is common for legal systems to allow courts and arbitrators to have parallel authority in issuing injunctions, leaving it to parties to choose between them,⁷⁷ but in England and Wales the authority of the court is relegated to that of the arbitrator.⁷⁸ Courts issue arbitration-related injunctions only with the approval of the arbitrator and when necessary (i.e., when injunctions upon third parties are requested). Moreover, the emphasis on alternative dispute resolution in England and Wales has resulted in Emergency Arbitrators (EAs), who can be accessed by parties even before an arbitration proceeding has been initiated. In Israel, court-annexed mediation seems to be mainly evaluative, though parties often sit in the same room for the large part of the mediation. Regarding the authority of arbitrator to issue injunctions, the law is ambiguous, but lower courts have interpreted it as conferring exclusive authority on courts to issue injunctions (prohibiting arbitrators from doing so).⁷⁹ In Italy, facilitative and transformative mediation seem to be relatively common, though this needs further exploration.⁸⁰ However, Art. 181 of the

Italian Way of Mediation, ARBITRATION LAW REVIEW, YEARBOOK ON ARBITRATION AND MEDIATION, 6 (2014), 180-203. See also Paola Lucarelli & Giuseppe Conte, *Mediazione e Progresso – Persona, Società, Professione, Impresa*, UTET, 235 (2012).

⁷⁷ Rachel Kent & Amanda Hollis, *Concurrent Jurisdiction of Arbitral Tribunals and National Courts to Issue Interim Measures in International Arbitration*, IN INTERIM AND EMERGENCY RELIEF IN INTERNATIONAL ARBITRATION 87 (Diora Ziyayeva, Ian A. Laird, Borzu Sabahi & Anne Marie Whitesell, eds., 2015).

⁷⁸ *Id.* (Not only England and Wales – France and Brazil, for instance, have an even lesser role for courts when arbitration is involved.)

⁷⁹ *Id.*

⁸⁰ Luigi Cominelli & Claudio Lucchiari, *Italian Mediators in Action: The Impact of Style and Attitude*, 35(2) CONFLICT RESOL.Q.223, 234 (2017) (explaining: "This distribution seems to contradict anecdotal experience, according to which most mediations are evaluative rather than transformative [Barr,2012], as well as the literature which established the prevalence of goal-oriented mediators over relationship-oriented mediators [Kressel et al. 2012].")

Code of Civil Procedure explicitly prohibits arbitrators from issuing injunctions.

III. POINTS OF CONVERGENCE

A. Multi-door landscape

With the growth of the ADR movement and the vanishing trial phenomenon, trial has become but one form of dispute resolution within a large host of others. Full trial is a rare commodity in common law systems and has fallen from its nearly exclusive status in continental law systems, both in criminal and civil cases. In the three studied jurisdictions, civil judges were authorized in legislation to help parties settle as part of a diverse legal landscape providing shortened and alternative resolution processes. These include pretrial, summary procedures, fast-track procedures, small claims, mediation, judicial mediation orders and referrals, judicial conciliation proposals, judicial arbitration, early neutral evaluation, and more. In Italy, reforms to this effect were met with much skepticism, and the reigning prediction was that judge would not tend to implement settlement tools since they would prefer adjudication. Yet reality has outdone prediction, and judges in Italy are using settlement tools, albeit in a distinct manner, as are their counterparts in England and Wales and Israel.

In criminal justice, the large majority of cases in Israel and England and Wales are resolved through plea bargains. Courts are positioned to support plea bargains through criminal pretrial (Moqqed) in Israel, where judges press parties (especially the prosecution) to reach pleas; and Goodyear hearings in England and Wales, where the judge gives a predicted verdict of the case to provide a basis for plea bargaining (sentencing guidelines may in time make this practice superfluous). In an arraignment hearing, we observed a judge offering to give a prediction to a defendant, who refused, preferring to continue to trial. Arraignment hearings are a central junction in both legal systems, though we did not see any settlement efforts involving the judge, prosecutor, and defendant's attorney in Westminster Magistrates' Court, in contrast to the Tel-Aviv County Court, where all players were immersed in this activity.⁸¹ Italy has created a variety of abbreviated trials in criminal justice, including a modified version of plea bargains, and, like, Israel and England and Wales, has given prosecutors and the police authority to dispose relatively minor cases under certain conditions (out-of-court disposals). The variety of out-of-court disposals is most prolific in England and is constantly growing in Israel as the institution of deferred prosecution and penal order is

⁸¹ PENNY DARBYSHIRE, *SITTING IN JUDGMENT: THE WORKING LIVES OF JUDGES* (2011) (observing that judges did not participate in the process of plea bargaining in courts where plea bargaining was the dominant culture).

expanded to more severe offences.

Both Israel and England and Wales have created community courts (for light offenses, under certain conditions). In this setting, judges along with social workers and other experts, explore the best way to rehabilitate light offenders and track their progress to make decisions on their case.⁸² A unique door of criminal mediation has developed in Israel to facilitate plea bargains within the courtroom and by judges.⁸³ ADR is promoted by the three legal systems in all its forms. Links of purview and referral between courtroom justice and ADR options have been formulated. “Going to trial” can translate into being referred to mediation; or the judge may take on a more hands-on approach and conciliate the case herself (through a conciliation proposal or hearing in Italy or judicial arbitration in Israel; in England judges have the authority to help cases settle but we did not see them using this authority to directly settle the case). Thus in all three jurisdictions, a multi-door phenomenon has replaced the formerly mainly adjudicative legal culture, much like Frank E. Sander predicted in the 1976 Roscoe Pound Conference, yet much less rosy.⁸⁴

Sander envisioned a “multi-door courthouse” in which each dispute would be channeled by a screening clerk to its most appropriate mode of dispute resolution.⁸⁵ Currently the realization of this vision is partial at best. While abbreviated proceedings are indeed often tailored to simple cases, which suit them best, the emphasis on efficiency rather than appropriate dispute resolution has led to a nearly wholesale avoidance of trial in Israel and England and Wales regardless of the merits of the case. Cases that make it to trial are characterized by recalcitrant litigants⁸⁶ rather than case characteristics (such as involving an important unanswered legal question). Sander’s vision seems more relevant to the current practices in the Florence Court, where judges issue reasoned mediation orders relating to the characteristics of the case. Judges whom we interviewed in the Florence Court have developed nuanced views on which cases are appropriate for a conciliation proposal, mediation order, or a judicial decision. For instance, one judge explained that conciliation proposals were appropriate when liability was clear and in claims against insurance companies if the claimant

⁸² Coscas-Williams, *supra* note 10.

⁸³ *Id.* See Ami Kobo, *Criminal Mediation*, 24 HAMISHPAT (2018) (Hebrew). Michal Alberstein & Nourit Zimmerman, *Judicial Conflict Resolution in Italy, Israel and England and Wales: A Comparative Analysis of Regulation*, IN COMPARATIVE DISPUTE RESOLUTION, (Moscatti, Roberts, & Palmer, eds. 2020); Beatrice Coscas Williams & Michal Alberstein, *Un palais de justice aux multiples portes » La Diversité des Réponses Pénales (Israël, Italie, France)* LES CAHIERS DE LA JUSTICE, 85 (2020).

⁸⁴ Sander, *supra* note 43.

⁸⁵ *Id.*

⁸⁶ Genn, *supra* note 25.

was willing to settle on a small amount. Administrative agencies, on the other hand, needed judicial decisions to receive a stamp of approval for their action. Mediation orders seemed appropriate when there was a business relationship between the parties, other legal cases pending between the parties, and even in some business-client relationships. These conclusions may not be transferable from culture to culture, but show a reasoning process that underlies the decision on the mode of dispute resolution, reminiscent of Sander's screening clerk. In contrast to such approaches, on several occasions judges in Israel have pointed to their ethical dilemma when encountering a case that requires a normative stipulation as in the case of administrative agencies. The common judicial practice will be to suggest a settlement based on their normative perspective on the case, and pursuing a trial has become in a sense a conflict of interest for them. Or a temptation they should avoid.

In the past decade, judges received authority to refer to mediation, to issue conciliation proposals, give mediation orders and (though rarely used) convene conciliation hearings. In Israel, in the 1990s, judges were given authority to facilitate settlement by law, especially during pretrial hearings. In England and Wales, judges received case management tools, including the authority to help settle cases following the Woolf Report in 1998. Judges inquired about settlement efforts in all three jurisdictions, and recognized the benefits of encouraging settlement in lightening caseloads (in Italy one judge expressed discontent at the new authorities given them – “Why should parties believe I really think mediation is the right path – they just think I want to bump them off”; “If I think that one party is right and the other wrong why should I encourage the party that is right to pay?”; “By the time I’m ready to write a conciliation proposal I can already write a decision on the case” – but in spite of that commented on the benefits in reducing the caseload).

B. Convergence between criminal and civil justice

As can be inferred from the above section, civil and criminal justice are converging in many respects. The multi-door phenomenon – the design of abbreviated and alternative procedures, mainly propelled by efficiency concerns – has transformed both realms of justice. In two common law-based legal systems in this study, Israel and England and Wales, the large majority of civil and criminal trials are settled (through negotiation between the parties or between the prosecutor and the defendant), with judges having a central role in case management in the cases that come to their attention.⁸⁷ In Italy,

⁸⁷ For judicial case management in criminal cases in England and Wales, see Darbyshire *supra* note 81; R. L. Denyer, *The Changing Role of the Judge in the Criminal Process*, 14 INT’L J. EVIDENCE & PROOF 96 (2010). In Israel: Kanner, Sari Luz Kanner, Dana Rosen, Yosef Zohar & Michal Alberstein, *Managerial Judicial Conflict Resolution*

full trial is no longer the obvious form of case disposition (42% of civil case in the Florence Court were disposed through trial; government figures indicate that around 60% of criminal cases are disposed through full trial).

In Israel, the pretrial judge in both civil and criminal cases seeks to facilitate settlement (plea bargains in criminal cases), employing settlement practices that were startlingly similar. Though judges in criminal pretrials spent more time on rescheduling in criminal trial when defendants did not show up (as presence of the defendant is mandatory), their judicial settlement practices included (similarly to those of their civil counterparts): litigotiation, forecasting the legal outcome, negatively presenting the judicial process, using lawyer-client relations to promote agreement, and using Alternative Dispute Resolution (ADR) techniques.⁸⁸ In England, trial is rare in both realms of justice, and judicial case management is an important feature of both civil and criminal trials to prevent protracted, wasteful trials and delay tactics. While a multi-door landscape has emerged for both civil and criminal justice in Italy, in both the judge retains an adjudicative function for a large portion of cases. In Italy, plea bargains entail the defendant agreeing to a sentence without admitting guilt, and are used in a minority of cases and only for relatively minor offenses.⁸⁹ However a variety of other forms of abbreviated criminal trials, more suited to Italy's legal culture, are also used to speed up legal proceedings by obviating the investigative or evidentiary phase.⁹⁰ The traditional difference between criminal and civil justice has begun to shrink due to a reduced emphasis on the investigative and evidentiary phases, which traditionally formed the main distinction between the civil and criminal trial.⁹¹

By eliminating or shortening the most time-consuming components of the criminal justice – the trial itself, with its numerous procedural protections, in adversarial justice; and the prolonged investigation undertaken by multiple players in inquisitorial justice (to ensure a fair, thorough investigation) – the special protections offered to defendants in criminal trials have decreased, making the criminal trial more similar to its civil counterpart.

(*JCR*) of *Plea Bargaining: Shadows of Law and Conflict Resolution*, 22(4) NEW CRIMINAL LAW REVIEW 494 (2019). For judicial case management in civil cases in England and Wales, see Darbyshire, *supra* note 81; Andrews, *supra* note 28. In Israel; Sela, *supra* note 15; Rosen-Zvi, *supra* note 67.

⁸⁸ Kanner, *supra* note 86. Cf. Sela, *supra* note 15.

⁸⁹ Langer, *supra* note 10.

⁹⁰ Riccardo Montana, *Procedural tradition in the Italian Criminal Justice System: The Semi-adversarial Reform in 1989 and the Inquisitorial Cultural Resistance to Adversarial Principles*, 20(4) INTNL. J. EVIDENCE & PROOF 289 (2016).

⁹¹ Coscas-Williams, *supra* note 10.

IV. POLICY IMPLICATIONS

A. *Human-centered design*

As mentioned in Part II, it is important distinguish between litigants that are repeat players (banks, insurance companies, government agencies) and litigants who are individuals (human litigants). Repeat players are parties to a large portion of cases and thus have ample accumulated data to reach optimal decisions – unlike individual litigants, who lack the experience and resources to obtain such data. In addition, most cases that involve individual litigants have them pitted against a repeat player rather than another individual litigant. Even with the help of an attorney, individual litigants are often "left in the dark" concerning possible case trajectories and the probable consequences of their choices.

In addition, institutional efficiency concerns may discourage individual litigants from trial in common law jurisdictions to the point that they are largely "locked out" – both from trial and from dialogue that addresses their needs. In England and Wales, trial largely remains an overly costly option for the average individual litigant, whose main choices are negotiation, and mediation that is similar to assisted negotiation.⁹² Similar troubles may affect disputants in Israel, though trial is less costly and mediation in civil cases is for the most part dispersed among mediators selected by the court administration. The feeling of being "locked out" can occur when they are in court for their pretrial and understand that trial is not the preferred choice upon the judge. For fear of upsetting the pretrial judge who is the same judge who will continue to trial, they may decide to settle. Indeed, for a large portion of disputes it may be the most appropriate option – but it is preferable that parties reach a decision on settlement without feeling pressured by the judge to do so.

Possible ways to remedy this situation start from recognizing the value of trial in specific cases – e.g., those that involve norm-making, especially in a technological age that provokes new and unforeseen normative questions, or those that support or clarify the alternatives to trial.⁹³ Recently, a judicial

⁹² Arbitration for the most part is not used at the initiative of human litigants, who generally participate in arbitration if mandated in commercial agreements. Rather, it is often used by businesses.

⁹³ Aharon Barak, *On Mediation*, 3 SHAAREI MISHPAT 9, 10 (2002) (Hebrew): "There are cases in which an agreed solution between the parties is not an achievable goal. Judicial decision is necessary. In other cases, an agreed solution is feasible, yet it is more desirable that the case be decided by the court to create a precedent that will be applied to the general public." On the possibility of mediation agreements being used as precedent (especially multi-party complex mediations that may be more suitable for authority-based mediation than for litigation, see Amos Gabrieli, Michal Alberstein, Nourit, *Authority-Based*

decision given in favor of a claimant who had been sexually harassed on Twitter, had requested that Twitter delete the tweet and was refused (until threatening court action) set a norm by which Twitter cannot refuse to delete a tweet that contains blatant sexual harassment. Had the claimant accepted a settlement offer, the public would have lost this public norm. Pre-action protocols for media and communications claims in England and Wales, which include an exchange of letters between the parties, indeed specify a shorter standard time period for response to the letter of claim (14 days instead of the leeway given in the general pre-action protocol, which stipulates 14 days for simple claims and up to three months for complex claims),⁹⁴ reflecting a nuanced handling of disputes. However, cost sanctions for unreasonably refusing to mediate apply to these types of disputes as well.

In many instances claimants might be interested in ADR, especially for this type of claim. But when they prefer trial, and an unanswered legal question is involved, it seems that the legal system should encourage them without reservation. At present, there is not much prioritization of precedential cases for trial;⁹⁵ mostly, only parties that are recalcitrant (and have the means) continue to trial. Personal injury claims for damages in England and Wales, however, are an example of deliberation on the types of claims that might require facilitation: such claimants are exempt from the general "user pays" rule (unless the claim was spurious), increasing both the likelihood of trial and a reasonable settlement (usually these claims involve a power disparity between the claimant and the defendant – e.g., an insurance company).⁹⁶

One of the implications of not getting precedential cases to trial is that the normative market is expanding and people learn about the prevailing norms through public settlement agreements. This seemed to be the case in a gender

Mediation, 20 CARDOZO J. CONFLICT RESOL. (2018) (noting that the backdrop of court is essential to bring the parties to the table, and stating that "shadow of the law" is becoming fainter: "[T]he legal system is driven by strong efficiency considerations which incentivize judges to avoid as much as possible complicated judgments that involve high costs to the system. Therefore, it is not that simple for the parties to recognize the "shadow of the law," which often becomes the shadow of the shadow since again and again the court will refer them to mediation, or to try and reach an agreement on their own – and in general, ask them to forgo a judicial ruling." Thus other mediation agreements may provide reference points for such cases.)

⁹⁴ UK Ministry of Justice, Pre-action Protocol for Media and Communications Claims https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_def [<https://perma.cc/N2A2-YLNT>]

⁹⁵ However, personal injury claims for damages are made possible by exempting claimants from the general "user pays" rule (unless the claim was spurious). See Civil Procedure Rules 44.13(1), Andrews *supra* note 28 at 140. This type of deliberation on the types and characteristics of claims that should be facilitated is

⁹⁶ See Civil Procedure Rules 44.13(1), Andrews *supra* note 28 at 140.

discrimination lawsuit against the El Al airline, which ended in a widely covered settlement agreement facilitated by the judge.⁹⁷ The settlement agreement included training for El Al staff to deal with gender-sensitive situations between passengers and a commitment to be more sensitive in the future.⁹⁸ This seems to be the case with some mediation agreements regarding child support, and in other areas as well, offering non-binding precedents. The publication of settlement agreements, if encouraged, can expand the public norm-making sphere. However, as the process leading to the agreements is confidential, and the mediator cannot impose norms on the parties, this type of norm-making has its limits. It is not certain that a norm made through mediation between Twitter and the claimant would have had the same impact. By deciding the case, the court may have prevented such disputes in the future – and the possibility that they may reach court.

By slightly changing the view of litigation to a more positive one, selective encouragement of trial can be created, giving disputants the sense that trial is available when needed. Thus, while legal systems might emphasize different stages of the legal process, they can "fit the forum to the fuss," distinguishing between cases and limiting the obstacles to trial – or encouraging negotiation or ADR – accordingly. While generalizing trial as a last resort or limiting most cases to pretrial may offer temporary alleviation of case backlog, norm-setting and clarification of ADR processes facilitate settlement and the prevention of disputes.⁹⁹

In Israel, where pretrial judges are positioned to help settle numerous cases that reach them, judges may portray trial in a negative light to encourage settlement, and create an impression that they are pressing the parties to settle. This may be largely attributed to the fact that judges are not trained to facilitate settlement. By training judges in settlement activity and delineating the ethical and unethical practices in this pursuit, clarity will be introduced into this central judicial activity and judges will be better equipped to conduct settlement efforts. Moreover, the measure of efficiency of first-instance judges might be refined (the present dry figures on the number of cases disposed for each judge can cause judges to focus on the end result – settlement – rather than on the way to get there). In addition, a formulation of the types of cases that should receive encouragement to go to trial can contribute to a positive view of trials by the judges themselves. This view –

⁹⁷ Hadas Cohen & Michal Alberstein, *Multilevel Access to Justice in a World of Vanishing Trials: A Conflict Resolution Perspective*, 47 *FORDHAM URB. L.J.* 1, 33-35 (2019).

⁹⁸ *Id.*

⁹⁹ Lynch, *supra* note at 1238 ("When too many cases settle, the parties are deprived of the supply of precedent that sets the framework for their private negotiations.")

rather than a sometimes negative view – can trickle down to litigants, who will have more faith in the legal system.

In the case of mediation, rhetoric can be better aligned with reality. If mediation is mainly a form of assisted bargaining, this also should be conveyed. If, on the other hand, the values of consensual resolution are important to legal systems, court-annexed mediation programs should allow for more joint sessions encouraging a broad perspective of the dispute and not rely too heavily on caucusing.

These are but a few possibilities that can be applied to a variety of legal systems. Another option, as demonstrated by Italy's legal system, is to create two separate forms of institutionally promoted justice – an adjudicative form that is present in courtrooms and includes judicial conciliation proposals that rely on liability (much like judicial early neutral evaluation in England and Wales) as well as general encouragement of settlement; and a transformative/facilitative form that is provided in mediation agencies officially approved by the Ministry of Justice, which place an emphasis on joint sessions.

Not only mediation, but also arbitration can be made more palatable by distinguishing between arbitration mandated by terms of service agreements between two parties with disparate power (such as a communications company and a consumer)¹⁰⁰ and arbitration decided through free consent of parties. Courts may intervene in the former (mitigating the power disparity so that terms of service contracts are not an arbitrary tool in the hands of the powerful) while giving mostly free reign to the other so that it can offer a complete solution.¹⁰¹

B. Ethical clarification of combined roles of judges

The different forms of separation and combination between adjudicative and settlement roles presented in this Article exemplify diverse possibilities for the judicial role. Since combination has the potential to result in coercion

¹⁰⁰ Such agreements are often not accepted at face value by courts. See Linda S. Mullenix, *Gaming the System: Protecting Consumers from Unconscionable Contractual Forum-Selection and Arbitration Clauses*, 66 HASTINGS L.J. 719 (2014).

¹⁰¹ Thus, in CA 5860/16 *Facebook Inc. v. Ohad Ben Hamu* (May 13 .2018.), a court in Israel decided that arbitration would take place in the user's country of residence despite an arbitration clause in a terms of service agreement. In other cases, where substantial consent is given to arbitration, the best support by courts for arbitration is usually non-intervention. In the U.S., this includes granting disputants the choice to receive emergency relief from an arbitrator rather than from the courts. *Bowers v. Northern Two Cayes Company Limited*, 2016 WL 3647339 at p. 2 (W.D.N.C. Cir. 2016); *Yahoo Inc. v. Microsoft Corp.*, 983 F. Supp. 2d 310 (S.D.N.Y. 2013); *Johnson v. Dentsply Sirona, Inc.*, 2017 WL 4295420 (N.D. Okla. 2017).

(suggestions by the authoritative deciding figure may be understood as demands), legal systems should compile an ethical code for outlining the desired and undesired practices related to the version of separation/combination they have chosen. Some legal systems already have an ethical code. For instance, the Commentary to the U.S. Code of Conduct for federal judges cautions that "[a] judge may encourage and seek to facilitate settlement but should not act in a manner that coerces any party into surrendering the right to have the controversy resolved by the courts."¹⁰² Section 13 of the Judicial Ethical Rules in Israel contains statements to a similar effect.¹⁰³ While the declarative value is important, such wording may be too vague to have practical value.¹⁰⁴ It seems important to clarify what is desired within the judicial settlement role and to raise awareness of judges to the import of their suggestions to parties. Furthermore, the new judicial discretion which judges have today due to the inclusion of settlement promotion in their roles is extensive and requires a nuanced balance between legal and conflict considerations.¹⁰⁵ Sometimes pursuing settlement goes against the need to generate norms, and many times diverse perspectives on law and diverse perspectives on conflict resolution provide an even more complex terrain for judicial involvement. The level of specificity in deciding on ethical practices can vary between legal systems, and would probably be affected by the level of formalism characterizing them. Legal systems that have an ethical code might reconsider and refine their content. For instance, the ethical implications of a pretrial judge who becomes the presiding judge on the case can be discussed and clarified.

C. Judicial training

As exemplified by the Florence Court collaboration with law scholars at Florence University, implementation of reforms can be effectively carried out through conscious deliberation and training. Calling upon judges to settle cases without equipping them to do so represents a simplified view of settlement practices. As demonstrated in this Article, the possible tools and

¹⁰² CODE OF JUDICIAL CONDUCT FOR U.S. CANON 3A(4) (ADMIN. OFFICE OF THE U.S. COURTS).

¹⁰³ Section 13 Judicial Ethical Rules formulated in 2007 concerns settlement, mediation and arbitration, and provides that, (a) 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. (b) A judge shall assist parties negotiating a settlement, on the condition that in doing so he maintains the dignity of the court

¹⁰⁴ Lynch, *supra* note

¹⁰⁵ Yuval Sinai & Michal Alberstein, *Expanding Judicial Discretion: Between Legal and Conflict Considerations*, 21 HARV.NEGOT. L. REV. 221 (2016).

practices involved are diverse. In addition, it seems from the observations of judges reverting to negative portrayal of trial (in the Florence Court as well, where training focused on mediation referrals rather than conciliation hearings), that even a few nuanced tools provided to them could make a big difference. For instance, when commenting on the time and costs of trial, judges can also say something positive about trial to offset the impression that the judge is pressing the parties to settle and to maintain public trust in the legal system. This type of positive and negative portrayal of trial was observed in some cases in Israel, with specific judges who have espoused a conflict resolution perspective. These judges also identified needs and interests of the parties. For instance, in a defamation lawsuit between a lawyer and his previous client, in which the lawyer demanded a high sum, the judge explained to the claimant: "In such cases the defendant often wants to apologize for a miserable comment but when there is a demand for costs – especially if the costs are high – will refuse to do so and be locked into a refusal to apologize so as not to pay." In addition, he said:

Defamation suits are usually emotional lawsuits that have three main aims: revenge on the defendant, giving the defendant a lesson not to repeat such actions, and financial compensation. The first two aims are achieved through the claim itself, bringing the person in front of a judge is not a pleasant experience, especially with the uncertainty as to the outcome.

Judges can be trained in needs identification, soft practices, and responsive judging,¹⁰⁶ so that they do not resort to pressuring the parties. Thus, aside from the reasoned judicial decision or judicially led litigation, judges will have another option: judicial conflict resolution.¹⁰⁷

In addition, training judges to diagnose the types of cases conducive to each form of dispute resolution can help them channel parties to the best option for their case. In one case, in which a business did not pay its rent, and expressed willingness to pay, stating that it would pay if it had the money, the judge said to the claimant:

That's the thing. There are parties who say they refuse to pay. This is not the case. That is why the persona of [specifies name of a mediator] can be persuasive, or maybe [another name], he's a real magician. So what do you want? To receive a judgment in three years and not be able to collect

¹⁰⁶ TANIA SOURDIN & ARCHIE ZARISKI, EDS. *THE RESPONSIVE JUDGE: INTERNATIONAL PERSPECTIVES* (2018).

¹⁰⁷ Michal Alberstein, *Judicial Conflict Resolution (JCR): A New Jurisprudence for an Emerging Judicial Practice*, 16 *CARDOZO J. CONFLICT RESOL.* 879 (2014-5).

the money?

While this statement includes a negative, perhaps exaggerated portrayal of trial that could be refined, it is specific to the case at hand, and offers an assessment of the options available to the claimant.

A one-day judicial training seminar was conducted in Israel by Alberstein's research group, enabling judges to reflect on their own roles, together. The training scheme was based on research findings and prepared with a simulation center that usually trains physicians. The training was based on a short movie, which raised many opportunities for learning and exercising judicial settlement activities. It was filmed in a real courtroom in collaboration with the Israeli National Center for Judicial Training. It was based on a real case observed by the team and performed by professional actors.¹⁰⁸ Judicial settlement-making, though a central practice, had hardly been talked about in their work before that opportunity. Re-creating such opportunities can proffer insights into the ethical aspects and possible roles of judges today while better equipping them with soft skills for the much transformed legal landscape.

D. Legal education

The emphasis on settlement, while pervasive in legal systems, is not yet translated into academic courses to prepare students for a legal career. While settlements are affected by the legal merits of the case and thus the ability to analyze legal issues is necessary, it is also important to become adept at negotiation, to study ethical questions that rise in a settlement-promoting culture, and to delve into the theoretical underpinnings of ADR and judicial settlement practices. Students should be equipped to "fit the forum to the fuss" – i.e., to make informed choices on the best way to proceed with a legal case. This is needed so that a coherent language is created within legal systems, one that is up-to-date with current judicial roles and the variety of methods to resolve disputes.

E. Transparency

Informed choice of disputants hinges on the availability of information on the length of legal proceedings, the possible case dispositions, settlement prospects, and ADR options. In addition, the public nature of trial,¹⁰⁹ even as

¹⁰⁸ For a description of the training and its elements, *see* International Advanced Conflict Resolution Training: Comparative Hands-On Exchange for Judges and Mediators to Promote Conflict Resolution in the Shadow of Authority https://www.youtube.com/watch?v=UJc36NI6CPk&list=PLXF_IJaFk-9C5MN9cT2CJa3hKW28fQSXX&index=32&t=7803s (last visited, Jan. 22, 2021).

¹⁰⁹ Article 6 of the European Convention of Human Rights, *supra* note 73.

trial is becoming increasingly privatized through ADR and judicial settlement practices (often off-the-record), requires transparency. Public awareness of the state of the legal system is also essential for their improvement.

Transparent information on the alternatives, backed up by statistics on the length and costs of trial as well as settlement outcomes (which can be provided in anonymized fashion by court-annexed mediation schemes) – will allow disputants to make informed choices on the most appropriate dispute resolution for them. Compilation of such transparent information can be made possible through a universal electronic file updated by a judge, anonymized and analyzed by the court administration and made available on a digital system. With the digitization of the court system in England and Wales, this type of information can be readily available in real time as litigants make their choices. With the digitization of legal systems (one of the parameters published by CEPEJ reports), it should be fairly simple to provide disputants with such information. Electronic files of cases anonymized and analyzed by court administrations can provide statistics for the general public. The question is whether legal systems are willing to do so. Among the many measures used by CEPEJ, transparency does not seem to be included, and perhaps should be added.

In addition, today's increasingly privatized nature of dispute resolution raises critical ethical questions regarding transparency. When judges discuss settlement with parties, much of the discussion is off the protocol to serve the interest of the disputants, who might not disclose information or propose settlement offers on protocol. However, the content of such discussions with the judge cannot be appealed, and, perhaps more importantly, is not available to other disputants and their lawyers, who assess their own case according to previous similar cases. With the increased use of ADR, questions regarding regulation and confidentiality have also become prevalent. Since court-annexed mediation is a government-provide service – should outcomes and process leading up to them should be supervised? Today arbitrators are often required to provide reasoned decisions whereas in the past this was not necessary – should the same be required of mediators? These are important questions that have implications for individual agency and public accountability, and the answers to them are not clear cut. Several decades after the transformation of the legal landscape (starting in the U.S. and spreading elsewhere) to a mostly non-adjudicative resolution of disputes, the time is ripe to take a deep look into the questions arising from the new dynamics currently characterizing the resolution of disputes.

CONCLUSION

Consider this scenario, based on the opening Kafka quote (our changes are in bold):

Before the law sits a virtual information officer. To this virtual information officer comes a man from the country who asks to gain entry into the law. But the information officer explains to the man that he has other alternatives as well, and asks him to consider them. The advantages and disadvantages of each option are laid out before him taking into account the characteristics of the case and the man's self-described priorities. The man thinks about it and then asks if he will be allowed to come in later on if he first tries mediation. "Sure," says the information officer. At the moment the gate to the law stands open, as always, and the information officer walks to the side, so the man bends over in order to see through the gate into the inside. When the virtual information officer notices that, he laughs and says: "If it tempts you so much, go in, they're pretty considerate in there, the judge will listen to your case and will try to help you resolve your conflict. In the meantime I can provide you with a reliable time and cost prediction related to your case, including probable mode of disposition and outcome for each choice you make – settlement, verdict or any other relevant door inside the courthouse." The man from the country has not expected such affability: the law is always accessible for everyone, he thinks. Maybe I'll try mediation first, and if that doesn't work, I'll come back.

This adapted scenario deals with many of the issues raised in this Article and holds the ingredients of a responsive, human-centered legal system: one that focuses on individual litigants, recognizing the discrepancy between individual players, who drift through legal systems without important data, and repeat players who have enough data to make optimal decisions. Such a human-centered legal system would encourage individual agency through flexibility, provide information and satisfactory options transparently, and focus on the needs of litigants and the nature of the case. These ingredients have large overlap with institutional interests (e.g., public trust, access to justice) as well as the aims of ADR.¹¹⁰ Furthermore, a large investment may not be required to realize many of them.

Policy implications emanating from this study include a conscious process of deliberation by policymakers on the dilemmas presented and

¹¹⁰ Shestowsky, *supra* note 50 at 551: "[The] self-determination goal of ADR could be further advanced if courts granted disputants more autonomy to exercise their preferences."; Sander *supra* note 43.

mainly small steps to create a human-centered design of legal systems. The dilemmas are well illustrated by the points of divergence between the legal systems: What stage should be emphasized by the legal system (taking into account a host of sometimes clashing considerations)? Relatedly, do judges have a central role in dealing with disputes? Should adjudication and settlement roles be combined, and in what manner? what is the legal system's view on trial? How far will the legal system go to increase individual agency and choice? Should alternative modes of norm generation based on settlements develop following the decline of written public reasoned verdicts?

The small steps include a change of rhetoric, ethical clarification, judicial training, transparency (made relatively easy through the digitization of legal systems), and a tweaking of the perspective on trial in cases that have precedential value or that clarify the alternatives to trial. These relatively small steps can make a huge difference in the agency of disputants and their faith in the legal system, while making substantial improvement to access to justice, especially in common law systems.

This study, in analyzing points of convergence and divergence, has presented a general multi-door landscape in both civil and criminal justice, within which judges have varying roles and disputants have divergent levels of choice. An emphasis on the pre-filing stage in England and Wales, often accompanied by mandated or highly incentivized actions that require investment of time and costs, distances the prospects of trial and the choice of litigants to access judges. An emphasis on the pretrial stage in Israel, while providing disputants with access to judges if they so choose (similar to the case in the U.S.), is also accompanied by institutional pressure discouraging parties from proceeding to trial. The emphasis on the trial phase in Italy provides litigants with choice regarding their options (though it is accompanied by a relatively lengthy disposition time). In the Florence Court, most cases settled by choice – parties settling on their own, settling with the help of the judge (e.g., through a conciliation proposal), or opting for mediation when explained by the judge as appropriate for the case. Considering that the statistical analysis took place on the heels of the reforms, the proportion of cases that settle may gradually increase. Thus access to trial may not necessarily lead to an overburdening of courts, especially if transparent information on the options is made possible.

In England and Wales, judicial settlement authority occurs mainly in relation to costs and time scheduling – encouraging parties to agree upon the process and its costs and deciding for them when necessary. Indirectly, this judicial effort encourages settlement by providing the parties with a realistic assessment of their chances in trial and the costs involved. In addition, early neutral evaluation by judges, which is currently rarely used, can help parties

settle while maintaining the adjudicative (albeit much shortened) function of the judge. In Israel, adjudicative and settlement roles are largely integrated in judicial practices. Judges encourage parties to settle, mainly in pretrial, while diving into the substance of the case, offering assessments and encouraging each party to settle. However, a broad perspective on disputes and a conflict resolution perspective was found only in a small proportion of cases. Some settlement practices relied on their adjudicative skills (in assessing or predicting outcomes of a case), thus partly retaining an adjudicative role, along with full adjudication in the rare case that proceeds to trial. In Italy, the emphasis on the trial stage in itself conserves the centrality and adjudicative role of the judge, allowing judges to regularly write reasoned decisions. In Italy, a separation between adjudicative and settlement roles is largely maintained – with judges adjudicating cases and offering conciliation proposals only when liability is determined on the one hand, and referring parties to mediation when the characteristics of the case seem appropriate on the other. They generally encourage parties to settle, but do not actively go into the substance of the case to do so.

The level of choice differed between the legal systems due to a wide array of other factors, including length of trial, costs, level of transparency, and the existence of mandatory or highly incentivized processes. Portrayal of trial varied: With a negative portrayal of trial on the institutional level but a neutral portrayal of trial by judges in England and Wales; a neutral portrayal of trial on the institutional level and sometimes negative portrayal of trial by judges in Israel; and a mostly positive portrayal of trial on the institutional level and as portrayed by judges in Italy.

The choices legal systems make often have an underlying line of reasoning, which differs among them. In each of the legal systems studied, this train of thought – specifically, regarding the centrality of courts and the main service they offer – leads to a wide range of subsequent decisions regarding the nature of ADR, the integration of settlement into the judicial role, and more. All approaches can be improved to create human-centered legal systems through tools that are becoming widely available. Digitization of legal systems can facilitate the provision of relevant information to human litigants (rendering statistical analysis by court administrations quite simple provided sufficient data is reliably entered). AI technologies might make this even more simple in time. The Covid-19 era has caused many legal systems, including those studied here, to increase the use of video-conferencing and telephone sessions (in court, arbitration and mediation). If legal systems will it, the digital age will increase transparency of legal systems (including the alternatives to trial), providing ample data to litigants for the making of informed choices. Judicial training and legal education that is compatible with an age of settlement can make the court experience more human-

centered by including soft approaches and ensuring pressure is not exerted on litigants to avoid trial. Since judicial pressure to settle can be accompanied by negative portrayal of trial, its replacement by other approaches (that may involve just a higher awareness to the way considerations might be presented) would be beneficial not only to litigants, but also to judges, lawyers, and society in general, enhancing individual agency, improving the reputation of the legal profession, and increasing public trust.

Lastly, standing “before the law” in a more responsive legal system in most cases may not even require reaching the gate of the court or its doorsteps. A responsive-human-centered approach to law can educate parties as to their rights, empower them by providing information on choice and conflict resolution options, focus on prevention and healing, and encourage organizations and institutional players to design responsive mediation centered dispute systems in house. Avoiding the courts may not mean escaping the law altogether and privatizing society, but rather internalizing legal norms and educating a participatory culture and citizenship in an age of vanishing trials and emerging new horizons of justice and conflict resolution.

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