

Looking to the future of the judiciary

- ★ An ever greater number of both civil and criminal cases do not reach the trial stage, with conflict resolution methods increasingly used to build a consensus between parties and reach a settlement.
- ★ We spoke to **Professor Michal Alberstein** of the Bar-Ilan University in Israel about the JCR project's work in investigating the changing role of the judiciary in an age of vanishing trials

An increasing number of civil and criminal cases are resolved outside the courtroom, with 97 percent of cases in England and Wales not reaching trial. This phenomenon of 'vanishing trials' is a topic of great interest to Professor Michal Alberstein, the Principal Investigator of the Judicial Conflict Resolution (JCR) project, an ERC-backed initiative in which researchers are analysing the changing role of the judiciary, building first on clear data. "We cannot really capture the reality of the changing role of judges in an age of vanishing trials, without first of all understanding to what extent are trials vanishing? And where are judges playing a role?" she outlines. The first stage of the project centered around a quantitative study, in which researchers aimed to assess the extent of the 'vanishing trials' phenomenon. "Assuming that 100 cases enter the system, how many of them reach a judge? At what stage does the judge intervene? And what mode of disposition will result from such an intervention?" continues Professor Alberstein. "We're looking at how cases proceed as they enter the system and move towards a resolution."

Legal systems

This research is focused on three legal systems, Israel, Italy and finally England and Wales, each with their own traditions and conventions. The system in England and Wales is traditionally quite adversarial, with legal teams making oral arguments and presenting supporting evidence, while Italy has a different model for civil cases. "Judges in Italy have a different role to their counterparts in England and Israel in civil cases. They sit at the same level as the parties, their office is less formal, and they decide on a case after they have seen the evidence. There is no separate stage of oral presentation, like in the adversarial system," explains Professor Alberstein. All legal systems represent a fusion of different elements to some extent, as the authorities seek to balance the considerations of transparency, due process and efficiency, yet they are also evolving in line with modern priorities. "In civil cases in England and Israel today, much more control is given to the judge, which is not common in the adversarial system. They have more freedom to manage the case," outlines Professor Alberstein. "Most processes end during the preliminary stage, which means that trial is rare."

The result of this shift is that the legal process itself becomes more inquisitorial rather than adversarial, with judges playing a prominent role in assessing the evidence and helping to resolve the conflict. Conflict resolution techniques are already commonly applied in some areas of the law, for example employment or family disputes, but Professor Alberstein says these types of cases are not the focus of attention in the project. "We are looking at more mainstream cases," she outlines. Judges are involved in various levels across the three legal regimes that the project is examining. "In Israel, judges are very much involved in the pre-trial phase of a civil case, even when they are presiding on it. They have a less significant role in criminal cases, while in England and Italy judges are involved in civil cases, but to a lesser degree than they are in Israel," explains Professor Alberstein.

A judge may seek to build a consensus between the parties, yet with the authority to impose a judgment if necessary. "There's a certain threat that if one of the parties don't accept the suggestions that are made then they could be penalised later on. In England there is a formal sanction of cost-shifting

JCR International Research Group tour of Jerusalem and Israeli High Court, 25th November 2018.
(Left to Right): Dr Yosef Zohar, Prof. Linda Mulcahy, Dr Edite Ronen, Dr Beatrice Coscos Williams, Dr Hadas Cohen, Adv. Sari Luz-Kanner, Dr Dana Rosen, Prof. Michal Alberstein, Dr Laura Ristori, Prof. Paola Lucarelli, Adv. Elisa Guazessi.



JCR Research Map



in cases where one of the parties refuses a reasonable settlement. In Israel, more discretion is given to the judge in deciding on cost sanctions. In Italy, the costs are also less explicitly imposed, yet parties may be ordered to attend mediation, and participate significantly in the sessions," explains Professor Alberstein. "So there are incentives for the parties to reach an agreement. It's a situation that requires careful ethical consideration, there are some questions about whether it's the right way to deal with conflicts."

A criminal case is of course different to a civil case, with different procedures and legal conventions. However, Professor Alberstein and her colleagues have found that in Israel, judges are still more likely to intervene at preliminary stages than was previously the case. "Judges in Israel exercise powers that are similar to inquisitorial judges. Within the preliminary stage they receive all the evidence and they can reach their own assessment of the case," she says. The judges in Israel assigned for preliminary hearings do not preside on the case if it continues to trial. "In these cases, a form of abbreviated trial is

more the rule," says Professor Alberstein. "We have found that abbreviated trials rather than plea bargains become the main causes for vanishing trials in inquisitorial countries. The full criminal trial, including full presentation of evidence and the formal procedural stages, is a rare phenomenon across legal cultures."

The more high-profile criminal cases may attract a lot more attention and publicity,

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with the prosecution and defence presenting different arguments, yet conflict resolution techniques can still be relevant in this type of situation. In Israel for example, an alternative legal proceeding called criminal mediation can be used, sometimes in parallel to the actual trial, which continues according to the normal rules. "The non-presiding judge attempts to help the parties reach a plea. This

is confidential and separate from the actual case," outlines Professor Alberstein. This may prove to be a more effective way of dealing with complex cases and processing large amounts of information and evidence than a more adversarial model. "These judges don't act just as mediators, they also know how to manage a trial. This interplay between the work of judges and the work of mediators

is sometimes helpful in concluding a case," continues Professor Alberstein. "In Israel, judges have a bit more scope to offer deals than in England and Wales."

Conflict resolution

There are many different ways of resolving conflicts, and judges today play an increasingly important role in identifying the appropriate

mechanism for individual cases. A full legal trial may be necessary in some circumstances, but other cases may require mediation, while other techniques are also available to try and reach a conclusion. "Judges can use modified modes of conflict resolution," says Professor Alberstein. This might mean something as simple as encouraging one of the parties to apologise for a mistake that they acknowledge they made, which can encourage dialogue, although Professor Alberstein says it's important to manage this type of situation carefully. "It's about trying to see how the parties respond to it, whether it gives them any incentive to move forward," she explains. "Judges need to know how to manage their emotions, to regulate the courtroom effectively and to constructively engage with the conflict. These are the soft skills that we want to help develop, that we will translate into training scenarios."

This is part of wider shift in the role of judges as some countries look to modernise their justice system, with the Briggs Report in the UK recommending the increased use of online courts for certain types of cases for example. Judges will still have an important role to play in the justice system as technology advances, yet they will need a wider range of skills. "Judges will need advanced conflict resolution skills," stresses Professor Alberstein. The way in which these skills can be applied may vary between different countries and legal cultures. "Legal culture in Israel has gone through some decline of formalism in the past decades and judicial discretion, including the use of policies and principles, is considered broad and significant, whereas England and

Wales has a more formal culture," continues Professor Alberstein.

In Italy, where the system is based on a code, the idea is to apply the law, so the judge does not have a high degree of discretion. "Judges apply the law as they read it from the codex," explains Professor Alberstein. "We found that there is some correlation between perceiving the law as an open texture and applying more conflict resolution tools. So as a general point the less formal we are – both in terms of procedure and legal rules – the more discretion the judge will have to include more conflict resolution techniques."

The phenomenon of vanishing trials is not limited to the three countries covered by the project, with pre-trial settlement increasingly common across the world. Given this backdrop, Professor Alberstein believes it's important to help the lawyers and judges of the future acquire not only legal knowledge, but also conflict resolution skills. "We need to train lawyers and legal professionals in negotiation skills. We should also teach judges how to do settlement work, with this new combination of conflict resolution and legal skills," she says. Alongside contributing to the literature, Professor Alberstein also plans to publicise her research and to participate in the wider debate around the evolving role of the judiciary. "I intend to continue writing about this phenomenon of vanishing trials, to examine it in different contexts, and to see whether we can really establish a broader perspective on the law," she continues. "We want to look towards addressing disputes and conflicts in a more holistic and relational way."

JCR

Judicial Conflict Resolution: Examining Hybrids of Non-adversarial Justice

Project Objectives

The Judicial Conflict Resolution (JCR) project explores the changing roles of judges in the era of "vanishing trials", wherein settlements and plea bargaining far outnumber full and final verdicts. The five-year long comparative study is taking place in three countries: Israel (project headquarters), England & Wales, and Italy. The activities include theoretical and regulatory legal research, as well as quantitative and qualitative empirical research.

Project Funding

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Project Partners

We are official partners with London School of Economics and our partner is Professor Linda Mulcahy. We also have an unofficial connection with the University of Firenze and Professor Paola Lucarelli. They are third party contractors.

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Michal Alberstein is a professor at The Faculty of Law, Bar-Ilan University, Israel, where she teaches jurisprudence and conflict resolution. She is the academic director of eight legal Clinics at Bar Ilan Faculty of Law. She is also the academic chairperson of "Israeli hope" project, supported by the president of Israel and The High Council of Education. Her current research includes dealing with theories of law and conflict resolution and their intellectual roots; as well as representations of conflict resolution in literature and film.

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Dr Ayelet Sela, Research fellow in the JCR Project at the International Conference held at Bar-Ilan University, 26th November 2018.