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**Judicial Conflict Resolution (JCR): Exploring the Changing Roles of Judges in a World of “Vanishing Trials”**

JCR (Judicial Conflict Resolution) 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.

**Goals of the Project**

The goals of the project are threefold.

1. First, it seeks to empirically describe the role of judges in promoting settlements and plea bargains, the nature of this involvement, and the various alternative dispute resolution tools employed by judges in this process. We define settlement from a conflict resolution perspective, as an agreement between the litigants about a resolution that ends the litigation. This may include an agreement of a claim or a charge withdrawal, or an agreement that the judge will give a summary verdict constrained by certain guidelines, or will ratify plea bargains.
2. Second, the research seeks to advance theory concerning the new roles performed by judges in the courtroom, which will lead to the conceptualization of a new jurisprudence of Judicial Conflict Resolution.
3. Finally, the research seeks to develop policy recommendations and training schemes for judges, and to establish norms and regulations for the process of reaching settlements. The research activities include theoretical and regulatory legal research, as well as quantitative and qualitative empirical research that is being carried out simultaneously in the three research countries.

Among the research activities we conduct a normative comparative review of the regulation of JCR activity in the three countries of research, including reference to reform schemes, ethical conduct rules and technological incentives. Research activities also include quantitative mapping of the phenomenon of judges’ settlement activities in civil and criminal cases, using databases from the various legal systems; the creation of a rich data system based on manual coding of information from court dockets and based on big data; in-depth interviews with lawyers, litigants, judges (serving or retired), and officials in the legal system; analysis of observations of hundreds of proceedings in courts, both criminal and civil ; administration of surveys for judges and lawyers in order to capture their JCR perceptions; development and advancement of legal theory via dialogue circles and publications of articles and books; developing training for judges, including simulation-based learning.

**JCR Research Questions**

***Vanishing Trials:*** The original presentation of the declining rate of verdicts, and the depiction of this phenomenon as “the vanishing trial” was made by Galanter (2004) in reference to the US legal system, both in the federal and the state level. Contemporary discussions on this matter in the US include reference to “the diminished trial” and the “extinct trial” and various frames of what is vanished exactly have been developed. The JCR research aims to provide a clear and nuanced definition of settlements and vanishing trials; a comparative perspective on vanishing trials in other legal systems and continents and a new model to capture relationship between judges’ involvement and case dispositions. In each research country we first ask to what extent are trials vanishing. The three countries of research have different rates of settlement, and while Israel and England are adversarial systems and have declining rate of trials and majority of settlements, the Italian legal system has strong inquisitorial foundations and a relatively low rate of settlements. In our quantitative mapping in each country, we ask what are the relationships between the stages of the case processing, judicial activities, and case disposition? We develop a model to capture these relationships. We also ask what are the relationships between judicial tracks, fields of law, and case dispositions.

***Relationship between Adjudication and Conflict Resolution:*** The inspiration for the JCR research project was the ADR (Alternative Dispute Resolution) revolution in the past century, and the aspiration expressed by some proponents of the field both in the US and Europe to transform the adversarial legal culture and to insert alternative modes of conflict resolution and soft methods into the legal system. Support of mediation as the paradigm alternative to adjudication were promoted as part of the European 2008 directive, and both in Israel, England and Wales and Italy reforms supported by court administrations were accompanied by mandatory or institutionalized mediation programs and trainings for professional mediators. This revolution has nevertheless not transformed legal culture and does not seem to have a very significant influence on case dispositions in three countries of research, and in the US, the birthplace of the vanishing trial phenomenon. The JCR research hypothesizes that unique hybrids of non-adversarial practices, coupled with managerial incentives embedded in the local legal culture have developed in each country. It aims to examine the relationship between adjudication and conflict resolution. Does contemporary adjudication include elements of conflict resolution and mediation? Has mediation inside the court been co-opted by adjudication, and if yes, should this process be supported or resisted? How do judges perceive their role between adjudication and conflict resolution? How are the boundaries between mediation in and outside the courtroom demarcated in each legal system?

***Regulation of JCR Activities***: Each legal system allows judges to use different forms of conflict resolution, and settlement practices of judges are influenced by various regulative schemes. Legal rules and precedents, ethical conduct rules, ombudsperson decisions, and administrative court reforms aim to incentivize judges’ behavior and to increase settlement rates in each research country. The JCR research asks what forms and modes of conflict resolution are available for judges by various regulative systems? We examine the gap between JCR in books and JCR in action by conducting court observations and interviews with judges. Following our findings and accumulated data during the research we ask what should be the preferred court Dispute System Design (DSD).

***Judges’ Practices:*** The roles of judges in promoting settlements have changed dramatically in the past decades, and in order to understand what do judges do in an era of vanishing trials JCR examines courtroom practices in our three research countries and aspires to understand systematically the new mode of adjudication which has developed in each place. The hypothesis underlying JCR is that the various Conflict Resolution methods which are used outside the courtroom, as alternatives to adjudication, could have a strong and positive influence, both theoretical and practical, on judicial activities inside the courts. Judicial activities may be conceptualized along the lines of generic modes of conflict resolution such as negotiation, mediation, arbitration and restorative justice, as well as other nonadversarial practices. We ask about judges’ practices in interviews and questionnaires; we observe and systematically describe their activities in the courtroom.

***Judges’ perceptions***: JCR focuses on the changing roles of judges in an age of vanishing trials and therefore understanding judges’ philosophies and perspectives on the contemporary culture of settlement is central. We ask judges about the role of the court, the role of the judge, their perspective on mediation in and outside the courtroom, their courtroom practices, their perspective on justice and efficiency; their jurisprudence of settlement. We examine these questions in surveys and interviews of judges and other legal actors – lawyers and litigants.

***Court Administration***: Vanishing trials are partly a consequence of national administrative reforms. In order to understand the roles of judges in promoting settlements, we ask for each legal system how are cases assigned to Judges and are allocated among them, what is the type of involvement of judges along the trial stages, how are judges evaluated and whether clearance rate is a central component in their evaluation, what are the declared goals for judges in their training and monitoring. These questions are explored in interviews and desk research.

***Authority and Conflict Resolution***: A major goal of JCR is to capture the relationship between legal authority and conflict resolution. Can adjudication become the last resort which eventually is expected to disappear, or is a certain “shadow of authority” necessary in order to incentivize litigants to reach agreements? How to differentiate the institutional authority of the court from the actual bench interaction with judges; what unique impact have judges who serve as non-presiding mediators or conciliators; what is the role of authority in conflict resolution activities of judges and how should they differ from activities of mediators? These questions are answered through in-depth interviews, theoretical development, surveys and courtroom observations.

***Trial Systems: adversarial and inquisitorial:*** Legal systems today are characterized by a fusion of adversarial and inquisitorial elements, yet basic differences still exit in the three legal cultures we examine. JCR asks what are the relationships between the features of a specific legal system and the characteristics of judicial involvement in promoting settlements and plea bargains within it. This question is answered through analytic and theoretical work referring mainly to the three research countries.

***Judges’ Training and Future Regulation:*** After collecting the data on vanishing trials and the judicial role in each country, JCR asks whether Judges activities to promote settlements and plea bargains should be regulated. If there is a unique role of mediating in the shadow of authority should Judges be trained to acquire JCR skills? We intend to explore these questions together with judges and to build a mini workshop developed in collaboration with a simulation center which can emphasize dilemmas and challenges raised by these new roles.

***Lawyers’ perceptions***: Lawyers are significant repeated players within the settlement culture of vanishing trials and understanding their perspective may shed new lights on judges’ roles. How do lawyers perceive the role of judges between mediation and adjudication? How do they perceive and evaluate existing court practices? who has the actual influence on clients’ willingness to settle? These questions will be answered through in-depth interviews and surveys.

***Civil and Criminal Law***: Judicial promotion of consensual disposition of legal cases takes place both in criminal and civil conflicts. Criminal cases are public and engage the state and defendant, while civil cases are between two litigants within a private interaction. JCR defines the criminal and civil conflicts in a way broader than the legal dispute, and aspires to give a comparative picture on negotiated justice as it emerges from research activities in three countries. We compare plea bargains in Israel, Italy and England and Wales, and address judicial involvement in relation to case dispositions by comparing between civil and criminal case management. The challenge of providing valid generalizable perspective on judicial behaviors and involvement in both criminal and civil cases is addressed in each research activity and the limitations of this generalizability are discussed when appropriate.

***JCR Derivative Research projects***: The research group gathered around the project and the circles of dialogue developed in its preliminary stages have encouraged individual derivative research projects developed by PhD students and independent researchers. Derivative research includes study of “the visible trial” and the actual right of appeal in the age of settlement; the effect of JCR on disadvantaged litigants; case law analysis and JCR rhetoric; authority-based mediation; the public domain of mediation; the domestic use of arbitration; JCR and gender; labor JCR and local differences; False guilty pleas and JCR; the changing roles of criminal defense lawyers, false guilty pleas.

**Interim Results**

The first stage of the research included the collection of data on the phenomenon of court-connected settlements, the legal framework governing judicially induced settlements, and the settlement culture in each country. It included court docket data analysis, pilot interviews with lawyers, judges and court administrators and preliminary pilot open-ended observations in trial courts. The goals of this stage were to provide context and framework for studying the phenomenon of JCR in each research country and to outline the scope of the comparative aspect of the research. We also seek to inform the development of a systematic observation methodology and a framework of analysis to be applied in later stages. The regulative mapping activity has been completed in the three research countries and revealed diverse legal regimes and cultures in reference to settlement activities of judges. A comparison of the regulation of JCR activity in the three countries revealed differences between the types of guidance available in this field. In England, the broad objective of promoting compromise is presented and procedural incentives are offered, while preserving the traditional roles of the judge. In Italy, special formal JCR tools are created, such as a "compulsory mediation" and a written and reasoned "settlement proposal". In Israel, pre-trial inquisitorial powers are granted, allowing informal space for JCR actions by judges, and incentives are provided through the computerized net-court system. In the criminal domain, different degrees of judicial involvement were identified, in plea bargains and in the various combinations of inquisitorial and adversarial tools integrated into the three legal systems. The actual work in conducting quantitative mapping within the first stage revealed a gap, which exists in official court dockets and required a deeper inquiry into systematic sampling of court dockets. Relying on big data and descriptive statistics as originally planned has proved impossible. Detailed data on case dispositions is lacking in the three states, and a more thorough statistical study of civil legal cases is conducted at this time, and will continue until June 2019, 18 months into the second stage of the research project. The empirical focus of the Israeli research team is in the central trial court - the Magistrates' Court.

An analysis of a representative sample of 1,036 Israeli civil trial court cases, revealed a relationship between judges’ procedural involvement (JPI) in litigation, and the lawsuits’ mode of disposition (MoD). We found that litigants and lawyers interact with the judge in the courtroom in only 30% of the cases: 19% terminate during or after a pretrial hearing, and 11% terminate during or after the trial. It follows that the majority of cases (70%) terminate during the filing and pleading phases, without any in-person encounter between the judge, the litigants, and the lawyers. A contested judgement in a format of a verdict was given in 8% of the cases, while settlements constituted 47% of case dispositions (35% court approved and 12% out of court).

According to the study, the subset of cases in which judges are involved includes intensive settlement activity: 60% of the cases that terminate following a pretrial hearings are settlements, and 16% of the cases that reach trial settle. In the criminal sphere an analysis of representative sample of 1606 criminal cases tried in Magistrate courts in Israel during 2010, revealed that the majority of cases end during the preliminary stage of the legal process. 91.3% of the cases ended in pretrial procedures before judges who will not preside on the trial and 8.7% ended following a trial. Out of the 91.3% cases that ended in preliminary stages, 57% ended following plea bargains, 14% ended following full or partial convictions while the remaining cases ended following a withdrawal by the prosecution for various reasons, and other technicalities. Out of the 8.7% cases ended in trials, 38% ended following plea bargains, 39% ended following full or partial convictions while the remaining cases ended following various reasons. In England and Wales, out of 29,614,374 civil claims commenced in County courts between 2000-2016, 16.9% of the claims were defended, 9% were allocated to track and only 3.4% of the claims were considered at a hearing or a trial. We are in a process of obtaining civil and criminal data from the Italian and English legal systems. Conducting pilot observations in Israeli courtrooms during the first stage, in order to build the methodology for the observations which take place in the second stage has resulted in very rich data, and inspired expansion of the observation activity to a larger and more developed methodology building through the processing of hundreds of observations and the use of a qualitative processing software (ATLAS.ti), while developing quantitative measuring as well, which is based on systematic coding of the observations reports. A special research scheme was developed for courtroom observations during JCR proceedings (Ronen et al. 2018). The rich data collected from the observations enabled the research team to map a wide range of judicial practices for promoting settlements, while providing examples from the field (Sela, Zimerman & Alberstein, Forthcoming). Thematic analysis of the preliminary observations carried out at the Magistrate Court in Tel Aviv revealed the following JCR themes: Judicial opening statement that expressed expectations or invitations to settle; on/off the record court hearings; the lawyer-client-judge interaction triangle; use of the judge’s authority to persuade sides to settle via court procedure and emphasis of legal costs; direct facilitation of litigation; prediction of possible legal outcome; procedural contracts that limit judicial power and grant parties increased control enacting de-facto quasi-arbitration; emphasis of the negative aspects if the legal process or outcome (legal aversion); use of ADR techniques; carry over effect in proximate hearings; style and tone of judicial intervention. Further analysis of courtroom observations using ATLAS.ti qualitative data analysis software showed the nuances of the relationship between the judges-lawyers-litigants that included judges questioning the sides themselves “above” the heads of the lawyers present, differentiated attitudes towards lawyers (harsh) versus litigants (empathetic) and strategically addressing lawyers in a complimentary manner to convince them to settle; self-reflection of judges on their own role when advocating for conciliation; positive referral to external actors such as mediators calling to them as “magicians” or “Gods of mediations”; framing the legal question of the case at hand and summarizing it; referral to non-legal interests such as national interests, emotions and relationships. These interventions place the observed judicial behavior between adversarial and inquisitorial, less conflict resolution than expected, and as portraying the trial phase as negative and unnecessary. Judges in Israel are gatekeepers to the trial, and an inquisitorial condensed process of prediction and litigation (a notion based on Galanter (1984): negotiation in the shadow of litigation) has become the substitute for a full process of adjudication. Court observations were conducted in criminal Israeli cases in pretrial stages . These are preliminary hearings conducted by a judge who will not preside on the trial stage. In the preliminary hearings, appearance of defendants is verified, indictments are read, appointment of public defence lawyers is made and plea bargains are proposed and approved. The main purpose of the preliminary hearing is to minimize the number of cases which reach trial and all legal cases must go through this stage. Possibilities of narrowing disagreements on facts or legal issues are considered during these hearings, sentencing is conducted and facilitation of plea bargains between the prosecution and defendants is encouraged. Senior representatives of the prosecution are present in the courthouse during these days, usually sitting in an adjacent room and they authorize bargains when necessary. We found that during these days, cases are disposed mostly after negotiation between the prosecution and the defence without the need of the judge to intervene apart from enabling this litigotiation and encouraging it. We found that although only in a small portion of cases in each hearing day active JCR interventions are conducted by the judges, the overall tendency is to prolong the preliminary phase and enable more hearings until an agreement between the parties will be reached. The theoretical aspects were developed during the first stage of the research through the JCR circles, bi-weekly seminars in which we invite academics, judges and lawyers to discuss various aspects of the JCR phenomenon, as well as through various discussions and writing projects. Some of these conferences have been documented and published on our website [www.jcrlab.com](http://www.jcrlab.com).

Among the themes discussed in the circles were: working with big data; generative narratives of settlement in law and literature; regulation theory and judges’ work; religious perspectives on compromise; empirical legal studies of judicial behavior; managerial judges; emotional regulation and judges’ work; hybrid models of adversarial and inquisitorial judging; authoritative mediation; trends in legal formalism and the judicial role; constructive processing of the criminal conflict; and evidence-based criminal justice.

During the first stage of the research we conducted various mostly informative interviews with key stakeholders in each judicial system. We met with administrators, lawyers, scholars, mediators and judges. In Israel, we are still in a process of obtaining permission to interview presiding judges and to send them surveys. We have interviewed retired judges and carried out informal conversations with presiding judges. Additionally, judges’ participate in various conferences and dialogue circles, some of them organized by the JCR team, and their speeches are publicly available for our research. In England and Italy we met, among others, The Lord Woolf, senior barristers, criminal and civil judges, the head of the Firenze Bar, and the President of the Firenze Tribunale. The information gathered in these preliminary interviews has revealed a very active settlement culture in Israel, a tension between formal declarations and actual work in England and Wales and some small enclaves of settlement awareness in Italy, including some resistance based on the search for justice.

Second stage of the research continues the court observations and includes interviews with Key Stakeholders. Considering the problems encountered in data collection in the three countries, some of the quantitative activities planned for the first stage are continuing into the second stage through development of research plans that analyze concrete court dockets using local datasets. Local teams led by Professor Linda Mulcahy from London School of Economics and Professor Paola Lucarelli from Firenze University are conducting quantitative analysis and coding of court dockets in each country. Our first stage findings indicate that in civil cases judges are involved in promoting settlements in different modes than we expected, namely, they rely more on authority and less on ADR practices. In criminal cases we found that judges are rarely involved in promoting the plea bargain, and their activities remain managerial and facilitative. Our informative interviews and pilot observations further indicate that unique undocumented activities of judges to promote settlement are mostly common in Israel and are less common in England and Wales and Italy. Qualitative interviews with judges, lawyers and parties are conducted in the second stage in order to capture their theories of conflict resolution, their construction of the judicial role, and their comments and perspectives on the findings during the first stage. Interviews were carried out in three respective research countries. In Israel we interviewed seven retired judges, six lawyers and four position holders in the attorney general’s office and in the Public Defense office. Unofficial conversations were held with two presiding judges, and talks judges gave and panels they participated in were recorded and transcribed by the researchers for the qualitative data set. Preliminary themes that emerge from the interviews indicate the significant effect of the “settlement culture” both inside and outside the courtroom. Interviewees maintained that within the courtroom tensions exist between the demand for efficiency in case management and high rate of case closure on the one hand, versus access to justice for the litigants and proper application of the law on the other. This resulted in judges’ developing judicial practices that are a hybrid between the adversarial and inquisitorial legal systems. They further explained that as some of these practices are not documented they are therefore not transparent, and only some of them are regulated. Lawyers who were interviewed said that they choose cases based on their settlement viability, and they strategize their litigation assuming cases will end in settlement and not with a judgement.

In England preliminary data was collected via conversations with judges and lawyers, and several interviews with judges. Interviews will be held with judges, lawyers and litigants in the upcoming months towards the creation of a more comprehensive data set. In these conversations the high cost of litigation was mentioned as a significant problem, and settlements were described as an affordable alternative. Less plea bargaining was attributed to the significant role of the jury in trials, and in terms of efficiency the need to ensure the jury’s understanding of complex legal matters slowed the pace of case termination; Additionally, judges indicated their adherence to the adversarial system and their maintenance of non-intervention in the legal process in order to refrain from pressuring the sides or showing their legal leanings. Lastly, unlike in Israel, since judges are allocated cases one after another and not in parallel, they seem less under pressure to dispose of cases compared to the Israeli judges who are evaluated based on their clearance rate among others.

In Italy, preliminary conversations were held with judges and lawyers. The data set is currently being compiled and it has not been analysed yet.

Preparation for the third stage. Depending on the findings in the previous stages and following them, JCR team intends to generate recommendations to change legal rules, codes of ethics, rules of conduct and policy framings, based on gaps articulated during the empirical stages of the research. JCR will create tools and training methods, including videotaped model simulations, for judges and candidates for judgment, in order to allow each judge to adopt the new skillsets and sensitivities. Most of the vignettes for the simulation trainings were already collected based on court observations and interviews conducted so far.

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All figures (1-5) are adapted from **"Vanishing Trials, Settlement Judges? What Data on Judicial Procedural Involvement in Civil Litigation Reveals about the Current Role of Judges," (Forthcoming) by Sela Ayelet & Limor Gabay-Egozy.**

47%

Court approved settlements

Out of court settlements

*Figure 3: Case Terminations by Mode of Disposition (N=1036)*

*Figure 2: Case Terminations by Judicial Procedural Involvement (JPI, N=1036)*

Figure 1: Case Terminations by Procedural Phase (N=1036)

*Figure 4: Judicial Procedural Involvement by Mode of Disposition (N=1036)*

n=298

n=429

n=118

n=191

n=81

n=48

n=2314

n=3664

n=1244

n=90

n=70

n=26

*Figure 5: Modes of Disposition by Judicial Procedural Involvement (JPI, N=1036)*

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