**The Study of Jewish Law in the Age of the Vanishing Trial**

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Good morning. I would like to open by thanking the organizers, not just for organizing the conference itself, but especially for suggesting that this sort of Jubilee conference provide an opportunity to stop and think beyond the boundaries of any given present research or the specific answer that I might propose. That is precisely what I shall endeavor to do here. I am not presenting existing research, but rather a suggestion for the particular junction at which we stand, for a new direction of study which may be meaningful for both general and Jewish law.

The legal system in Israel, but not only in Israel, is coping with a phenomenon that, although not new, has taken on dimensions that must be addressed by the research community: the phenomenon of the "Vanishing Trial".  The legal system with which we are familiar, in which judges adjudicate based on laws, and the question of whether they should stray from those laws or reinterpret them, is steadily disappearing.  Conflict resolution movements, along with therapeutic jurisprudence and multicultural perspectives on law which actively object to the advancement of a single, unified legal narrative, only add to the impossible load placed on judges' shoulders and to the public's dissatisfaction with the long, exhausting legal processes that leave the sides injured and angry for years.  All of this influences and reflects one simple phenomenon: Courts no longer uphold the law.  Without distinguishing between the different courts and types of cases, the raw numbers are astonishing: some say 88 percent of cases, some 90, and in the United States there are those who say that more than 98 percent of cases do not conclude with a classic legal decision by the Judge.  Various types of alternative procedures take the place of traditional court decisions, leading to decisions that cannot be appealed or are not subject to judicial review, do not continue the production of new law, and whose relation to positive law must yet be defined and researched.

The Age of the Vanishing Trial challenges the entire world of law as we have known it, and raises a plethora of questions: How will such a system function over time? Will it have any legal guidelines in the event that it ceases to produce its own legal precedents?  What sort of relationship will be built between an academy that researches law and a legal system that does not perform law?  What types of lawyers will such a system require, and what training will suffice for its judges?  Will traffic officers enforce laws, and if so, which? And which legal fields will remain beyond the scope of compromise and mediation, and will not vanish? The legal world is searching for answers.

Both historical and *halakhic* materials reveal that courts of Jewish Law frequently preferred settlement over other legal solutions. This was perhaps the result of an active preference for compromise based on the aspiration for a law of peace and involving, in some sources, therapeutic jurisprudence. Alternatively, the preference may have come from lack of other options, stemming from concern over negative effects that may arise from adjudicating based on *Torah* law in a culture of dispute and multiple voices, or from external pressures stemming from the courts' standing as a not-always-legitimate alternative to the sovereign legal system.  Such a system, which foregoes stability and certainty for the sake of other values, places the judge and his actions, not the law, in the center, and challenges the world of research from several directions. Many talented researchers who dealt with the concept of compromise in Jewish Law have attempted to define its multi-faceted character. The world of Jewish Law is searching for answers as well.

This is the point at which I suggest collaborative thinking. With a history of hundreds of years of a communal legal system based on alternative decisions, the study of Jewish Law can provide an answer not only for itself. I do not mean to suggest conducting comparative law research. I suggest developing jurisprudential insights regarding judicial conflict resolution which may lead general research to renewed thinking about the legal system, its relation with the law and its development, and its relation with legal research generally and the training of lawyers and judges particularly. Jewish Law’s expansive dealings in the field of settlement, which may have been considered an obstacle in the age of the Dogmatic, Formalistic Trial, is revealing itself in the 21st century as an advantage. Jewish Law may also stand to benefit. When it comes to a deeper understanding of the many alternative decisions in the world of Jewish Law, modern discussions which exact and perfect such proceedings may provide tools and names to recategorize disputed Talmudic topics. In what follows, I will attempt to exemplify the structure of the process from both directions.

I will begin with the potential gains for Jewish Law, or: in praise of conceptualization.

Before the advent of the ADR and similar movements, the meaning of “settlement” in Western law was narrow. Jewish Law researchers who attempted to introduce halachic sources with said narrow meaning, read the various sources through its lenses, mainly producing conceptual and philological works on ideas such as execution and compromise. The expansion of the world of alternative proceedings has clarified that there is no need to arrive at one singular interpretation; it has sharpened and enriched discourse and our different possible readings, all with proper caution against anachronism.

If we identify the judicial process as proceedings in which at least one of the sides is present against his will, in which the adjudicators are not assigned based on the litigants’ wishes, and in which the results are dictated by law, or at least by the judge’s own understanding of the proper application of the law, then alternative proceedings may diverge to some degree from any one or more of these characteristics. The process itself may be different, the litigants’ degree of agreement with the steps taken during the proceeding may be different, as well may be the result. In law-based arbitration, the sides agree to the adjudicator’s identity but the results are similar to those of standard judicial proceedings. This is how Berachyahu Lifshitz suggests understanding Talmudic compromise. A decision by a judge which diverges from a result that awards 100% of what one of the sides deserve by law is generally referred to as compromise. Hayim Shapira is of the opinion that this is the meaning of “execution”, and that is how Itay Lifshitz proposes understanding Talmudic compromise. For the sake of accuracy, we will refer to this as “forced compromise”, since the results, like those of a judicial decision in a court case, are mandatory. Today, proceedings which combine agreement both to the identity of the adjudicators and to the results which may not be based on law, are generally referred to as Arbitration, a compound which became a reality of life for Jewish Law due to both external and internal circumstances. Itay Lifshitz adds that the *Rishonim* understood the difference to lie in the process as well as the result: the judge does not give a decision of compromise, but functions as an intermediary, and offers a sort of mediation process. Another option is removing the litigants from the court and encouraging them to come to an agreement without an intermediary. “Go out and perform” as Gulack suggests – execution outside, compromise inside, and in modern terms: a settlement which receives the support of the court. An analysis shows that there is also a place for Restorative Justice in the sources, if we agree to add non-exclusively civil cases to the discussion. As Maimonides concludes in the Laws of Repentance, 2, 8: the proper ending to a conflict is in pleasing and appeasing the injured party, and depends on the ability of the injured party to be appeased and truly forgive the injurer as well. Five central concepts, six if we include criminal proceedings, thus play a role in an analysis of Jewish Law sources: arbitration, law-based arbitration, settlements and forced compromise, mediation and restorative justice. Exacting work based on these concepts, even though some of them never appeared in the halachic sages’ discussions, may well enrich halachic rhetoric and aid it in reaching precision.

I am of the opinion, for example, that greater space should be given to mediation and the intermediary. Many sources explicitly emphasize elements from the field of mediation, such as leading the sides to neutralize hostile feelings, aiding them in parting as friends, the work of Aaron in approaching each side separately in order to soften his anger, solutions of increasing the cake, as in the story of King Katzya. Moreover, there is a series of Talmudic sources which are interpreted as forced compromise though they can equally be interpreted as mediation, and there are sources which raise interpretive uncertainty, in which mediation appears to be the optimal interpretation. Rabbi Eliezer ben Rabbi Yossi HaGlili’s emphatic objection to performance, as recorded in *Tosefta Sanhedrin*, is commonly attributed to the adjudicator forcing compromise rather than carrying out the law. Rabbi Eliezer’s language does not indicate one interpretation or another. Yet one of the claims for understanding the source as forced compromise is by process of elimination: the performance that Rabbi Eliezer speaks of cannot be interpreted as mediation that is meant to lead to a mutually agreed-upon result, since that is not considered an act which could inspire such anger in Rabbi Eliezer. It should be noted here that the world of legal dispute of the last quarter of the twentieth century shows just how greatly the possibility of mediation is seen as a threat by people of the law. Evan Payes, in his article “Against Settlement” clarifies this in a series of weighty claims which I will later discuss.

Several more examples of uncertain sources which are commonly interpreted otherwise and for which I believe mediation is the best-suited interpretation: in an early *midrash* from *Sifrei* Numbers, 95, in which Moses liaises between the Israelites and God during the story of the people’s desire for meat, the people say mockingly, “this is a compromise”. They believe Moses to be a simple messenger, “who does not have the power to grant our wish”. The story in *Vayikra Raba* 6, 5 is similar: “We heard His voice from the fire. Rabbi Johanan stated, they compromised, that He does not deny them and they do not deny Him…” It is suggested that this be interpreted as agreement, or division and allotment. It seems correct to me that the compromise which describes the beginning of the reception of the Ten Commandments emphasizes, of all things, Moses’ mediation demanded by the people, after they heard God’s voice from the fire. In the continuation of that same midrash, when discussing the Israelite’s punishments for their sins, the verse from Lamentations 2, 17, “he carried out his word” is interpreted as “compromises of a settler”. In the very difficult context of the verse from Lamentations in which it is written, “he destroyed and had no compassion”, it is not easy to claim that this is a case of compromised punishment. It seems to me that the emphasis is on punishment via the enemy, the oppressor, who are mentioned in the verse and the midrash, meaning punishment through a mediator. That is how Rashi interpreted the verse in Ecclesiastes 8, 1, “'and who knows the true meaning of the thing' – 'meaning', in the sense of 'settlement, compromise', as found in Daniel, whose wisdom in the fear of heaven was such that 'secrets of meaning' were revealed to him, and was like Moses in making settlements between Israel and their Father in Heaven". It was suggested that this contains different meanings of *peshara*, interpretation and conflict resolution. In my opinion, there is only one meaning here, and it is mediation. One who knows the secrets of heaven knows the mediation of the *sephirot*, as Moses mediated between the Israelites and God.

I will conclude the first section with a few words on the *Rashbam*’s commentary on the Gemara’s quandry over whether it is better that the adjudicator allot contested money to the person he believes more likely to be its owner, in a non-clear-cut case (*“shuda didaynei”*), or if it is preferable to divide the money between the litigants, in a manner identical to classic forced compromises which allot 50% to each side.

-*Rashbam* on tractate *Bava Batra*, 35:1

"*Shuda Didaynei":* to the one towards whom the adjudicators' hearts are inclined to think that the endower loved and was close to, and certainly decided to bestow his wealth upon, to him they grant the land. But when they divide, one side certainly takes a half that is not rightfully his.

The *Rashbam* proposes a fascinating discussion: on the one hand, if the adjudicator decides based on *“shuda didaynei”,* and awards the estate to one of the two “beneficiaries”, judging by the results, one side has 100% and the other has none, but judging by the truth of the matter, there is a 50% chance of error. There is no doubt that the deceased meant to award the property to only one beneficiary, such that there is a 50% chance that the adjudicator acted according to the deceased’s will. On the other hand, if the adjudicator rules for a settlement and divides the money between the two litigants, it is well that that will result in each side receiving 50%, but judging by the truth of the matter, that is 100% mistaken. The deceased certainly did not mean to divide his estate in half.

This analysis is a seemingly strong argument against the alternative proceedings, yet this is precisely the place in which exactitude can be achieved with modern proceedings: the case in *Bava Batra* assumes one story with one truth. It is possible that when it is clear that more than one story is involved and the picture is complex, and that there is a multiplicity of voices, that we will prefer to forego the adjudicator’s discretion in granting 100% to one side, and turn to processes whose proceedings involve a multiplicity of voices and end in agreement.

And now, the second section: Jewish Law’s possible contribution to the uncertainties surrounding the Vanishing Trial phenomenon.

As I stated at the outset, alternative proceedings have become a fact on the ground over the last several years. They are a fact that raises much criticism. Were Jewish Law to be volunteered as Western Law’s guinea pig, in hindsight its hundreds of years of experience might lead it to join the critics, but it might also offer its own ways of coping with some of the reservations over the legal system that does not go to trial.

Criticisms are generally divided into four categories, and I will focus herein on three of them. I will follow the lead of Michal Alberstein and answer the arguments from the spheres of Law and Rights, Law and Society, and Law and Critical Thinking.

1. Law and Rights – the central claim here is that a legal system which does not go to trial does not, in practice, produce law. Judicial proceedings, according to Evan Payes in his article, “Against Settlement”, have an essential role in creating, establishing and implementing rights. They are a tool for social change, for clarifying public values and defining them. Assuming the Anglo-American system which is built on precedent, when there are no precedents, there are no more trials. Moreover, the plethora of negotiation arrangements will erase years of achievements that lead to the production of current norms. The claim is that the ADR movement goes against the Court’s developments and turns back the wheel. An alternative arrangement which leaves the disputed topic to power-based negotiations and risks injuring the weak is missing the public element that exists in court proceedings, and relegates public rhetoric to discussions among neighbors. Law-based judgements deter inappropriate behaviors, establish proper behavior, adjudicate based on facts and dictate public narrative. They lend legitimacy to the use of force – implementation – and lower negative externalities.

How can we deal with such arguments?

We could admit that, yes, the legal system loses all these things, but prefers to gain dialogue, non-antagonistic dialogue, a law of peace. Those are no-less important public values. Most people who deal with Jewish Law seem to view the Halachic world’s explicit preference for settlements in this light. I, however, believe two more complex answers are hiding between the lines.

The first answer: Frank Sander, the father of modern mediation, already suggested that not all cases go to mediation. An organized check must be done to determine which topics require creation of a new public narrative, which topics are at elevated risk that going to negotiation will turn into blackmail, and those should always go to trial. Trial has advantages in certain cases, and alternative solutions have in others. In studying Jewish Law, I would like to suggest a third parameter: there are cases which should not go to negotiation because the fitting result for them is so obvious that there is a greater chance that negotiation injure a right that should be protected by the courts. An analysis of the series of sources that restrict settlements to cases in which the adjudicator does not immediately know where the case will lead may contribute to this parameter’s accuracy. Jewish Law’s experience also indicates that sides to the conflict may be allowed to choose whether to go to trial or attempt a settlement. Various interests will influence the sides’ choices, and there will ultimately be cases that go one way and cases that go another, but most crucially, the sides will have greater autonomy.

The second, perhaps more important answer with regards to Jewish Law’s contribution to discourse is that values can be obtained in a legal system that lives most of its life in a sphere of compromise (this being a working assumption of mine, not an empirical, factual statement). First, of course, Jewish Law applies its own systems of execution and of alternative judgements. The boycott that the community imposed on those who did not pay their debts did not depend on whether the debt was reduced in half in a settlement. The institution, not the content of the given case, grants legitimacy. More importantly, however, the history of Jewish Law offers other ways of maintaining public discussion of values and the development of law. The study in the *bet midrash*, the interpretive discourse, the attempts to create various codices, the extensive literature of questions and answers – all coexisted alongside a system that did not always wait for the answers of the respondents, and apparently preferred settlements. There is no reason to assume that the court is the only place in which to hold the discourse. Note: the existence of the court itself is absolutely necessary. The crisis in the development of discourse in Jewish Law following the emancipation and the reduction of queries addressed to the Jewish courts may attest to this. The general system must adopt similar practices: to study and teach the law and its logic, to continue to strengthen creativity and critical thinking in law faculties, and to come with options for cross-border consultation of separation of powers between academia and the judicial system.

1. Law and Society – Marc Galanter, representing the school of Law and Society, has a number of claims regarding the ADR movement. His positive claim is that in a law-based system, the strong, especially the returning player who knows how to play the game, has an advantage. It is best for the one-time player to be represented by a lawyer who can function for him as a returning player. Alternative proceedings are, in this sense, more suited to the one-time player. It is thus that Jewish Law can contribute from its experience as a lawyer-free system meant for one-time players and whose legal assumptions, such as *migo,* are not suited to returning players.

The school of Law and Society criticized the ADR movement as sounding a superfluous cry, because the load on the courts is not that heavy. Galanter believed this to be a sort of urban legend, and that the public wished to claim that the court systems would not last for ideological reasons. Following the history of the Jewish judicial system, which declared that it would no longer adjudicate criminal law because there were too many murderers and not all could be tried, and which defined the entire area of fines as subject to alternative proceedings but which in practice continued to try common, monetary cases, may be a fascinating exercise.

Galanter believes that the naming-blaming-claiming process, in which the injured learns to call the injury by its name and define it as a legal right, can then blame the injurer and can then sue, indicates that many cases have remained outside the system, and the number of legal cases will grow in tandem with society’s rowing awareness of its rights. Trials are the result of a social construct. It may be interesting to check, as a suggestion for discourse and research, if in Jewish Law’s many years of experience the process was ever halted before the stage of claiming. I propose two directions for examination. First, a society that knows law is more capable of defining the rights of the injured, yet perhaps such knowledge would produce fewer injuries. This is to say that the potential injurer’s knowledge of the law may serve to deter him. Learning and knowing the law place clear boundaries between what is and is not permissible, and they may at least aid the good children who do not wish to break the law. A second direction would be to examine if the exact definition of sanctions would prevent unnecessary proceedings; not just what is forbidden but what one pays for it. That is another historical goal of the Jewish Law system, in preferring confessions and loans over cases that required assessments. This would, of course, require clear laws and, in that sense, more thought must be put into formal laws, with clear measures, as Jewish Law prefers. When transferring to a system that does not adjudicate based on law, the law must exist so clearly as to be able to direct behavior beyond the walls of the courts. Extensive legislation of amorphous concepts is suited for courts that adjudicate based on law.

1. Law and Critical Thinking – those of this school will claim that alternative systems are not alternative when applied to the judges themselves. This appears to be an escape from the system, freedom from being controlled, yet in practice, this is a process which insinuates itself over the individual's way of thinking. Even if the mediators and arbitrators are not themselves judges, they are authorizes by the system, and the litigants are referred to them by the system.

Here is the appropriate place to take advantage of the discussion to clarify the job of the adjudicator at the outset of the legal proceedings. If we take the stance that prefers settlement and compromise, can the adjudicator force the litigants to turn to alternative proceedings? This question has several answers of varying degrees of practicality.

The *Tosefta* suggests two principle stances: that of Rabbi Shimon ben Menasya, which is articulated in the language of permission, and that of Rabbi Yehoshua ben Korha, which talks about commandment. Ultimately, after a long process, the stance adopted in practice is somewhere in between the two:

As written in the *Shulhan Arukh, Hoshen Mishpat,* 12, 2:

"It is a commandment to say to the litigants at the start: do you wish judgment or compromise? If they desire compromise, you settle between them…And any court that settles between the sides, how much better it is…."

In other words, there is only an obligation to offer, to give the litigants the choice. They can refuse. In any event, in a certain sense, whoever is not prepared to enter into agreement-based proceedings will not be able to finish them.

Jewish Law, then, offers the practical option of refusing alternative proceedings. The option's very existence reduces the power of claims of indoctrination, and perhaps even offers the proper balance between cases suited for mediation and those unsuited to it.

Jewish Law's adjudication system is ancient and fascinating, and can give of its knowledge in many fields. In this lecture, I sought to raise the institutional discussion which the Israeli legal system, as well as legal systems the world over, are so caught up with. Where is the legal system in the world of the vanishing trial heading? I repeat my proposal that energy be invested in this project, and my belief that sober, conceptual discourse, without claims regarding guaranteed influences or anachronisms, can healthily challenge both systems.

Thank you.

Kirshenbaum, in his paper on victimology and Jewish Law, displays the relationship between Jewish Law's approach to forgiveness and mediation between the criminal and his victim.

**Maimonidies, Laws of Forgiveness, 2, 9**

**Sins between man and his fellow, such as one who injures or curses or robs his friend, are never forgiven, until the perpetrator gives his friend what he owes him, and appeases him.**

**Even if he has repaid the money owed him, he must appease him and ask forgiveness of him. Even if he only verbally mocked his friend, he must appease him until he forgives him.**

**If his friend did not wish to forgive him, he must bring three people to hurt him, and then ask of the friend forgiveness. If the friend is still not appeased, he must bring a second and third. Should the friend still not wish to forgive, he may leave his friend, who becomes the sinner. But if the friend was his teacher, he must attempt to appease him, even one thousand times, until he forgives.**

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**A person shall not be cruel and refuse to be appeased, but shall be easy to please and hard to anger. And when the sinner asks him forgiveness, he must forgive with a full heart and a desiring soul. Even towards one who greatly pains him, he shall not hold a grudge against him.**

The discussion in modern law removes these laws from their context in the laws of forgiveness and from their religious purpose, and uses them in thinking about criminal law proceedings, which has not received proper attention. The question to be asked is not how a person must repent on the eve of the Day of Atonement, but how to end conflict between two people.