What Is Civil Justice For? Reform, ADR, and Access to Justice

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This Essay focuses on current civil justice policy in England and Wales and argues that, as a result of trends over the last fifteen years, the value of a public civil justice system is being challenged, while access to that system is being inhibited by both new procedural and funding measures. Accompanied by a profound change in civil justice discourse, the relevant interdependent justice policy strands involve the promotion of mediation and the withdrawal of the state from civil disputes; the removal of legal aid from most non-criminal issues; and a reduction in resources for the courts with fewer full-time judges.

I. CIVIL JUSTICE AS A PUBLIC GOOD

My starting point is that the civil justice system is a public good that serves more than private interests. The civil courts contribute quietly and significantly to social and economic well-being. They play a part in the sense that we live in an orderly society where there are rights and protections, and that these rights and protections can be made good. In societies governed by the rule of law, the courts provide the community's defence against arbitrary government action. They promote social order and facilitate the peaceful resolution of disputes. In publishing their decisions, the courts communicate and reinforce civic values and norms. Most importantly, the civil courts support economic activity. Law is pivotal to the functioning of markets. Contracts between strangers are possible because rights are fairly allocated within a known legal framework and are enforceable through the courts if they are breached. Thriving economies depend on a strong state that will secure property rights and investments.

In my view we have witnessed in England over the past decade the decline of the civil justice system and official pressure to divert civil

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disputes to private dispute resolution, accompanied by a troubling anti-adjudication rhetoric. It seems as though state responsibility for providing effective and peaceful forums for resolving civil disputes is being shrugged off through a discourse that locates civil justice as a private matter rather than as a public and socially important good. The public courts and judiciary may not be a *public service* like health or transport systems, but the judicial system *serves the public* and the rule of law in a way that transcends private interests.

While the private value of civil justice is in the termination of disputes, the public function of civil justice is explicitly linked with the value of adjudication. Authoritative judicial determination has a critical public function in common-law systems, creating the framework or the "shadow" in which the settlement of disputes can be achieved. That it is underpinned by the coercive power of the state provides the background threat that brings unwilling litigants to the negotiating table and makes it possible for weaker parties to enforce their rights and to expose wrongdoing.[1] Even though most disputes settle without the need for trial, a flow of adjudicated cases is necessary to provide guidance on the law and, occasionally, to make new leaps. Take the case of Mrs. Donoghue and the snail in the ginger beer bottle, decided by the House of Lords in 1932.[2] The case effectively transformed the law. Whatever view is taken of the decision, the case established protection for consumers, created an incentive for those who create risks to take care, and the possibility of redress for those harmed by negligent actions. In this way the common law has developed on the back of private and business disputes and millions of cases have been settled in its wake. Teaching this recently and turning over some of these issues, I was fascinated by the question of how Mrs. Donoghue succeeded in having her suit heard by the House of Lords and wondered whether such a case would be likely to reach the courts today.

II. CIVIL JUSTICE REFORM IN ENGLAND, 1999

In analysing current civil justice policy and trying to understand how we got here, my starting point is the context for the major reforms to civil justice in England and Wales that took place in 1999 following the Woolf reports on access to justice of 1995 and 1996. Context is important because it explains some of the government's motivation for the review of civil justice and some of the policy initiatives that have followed the

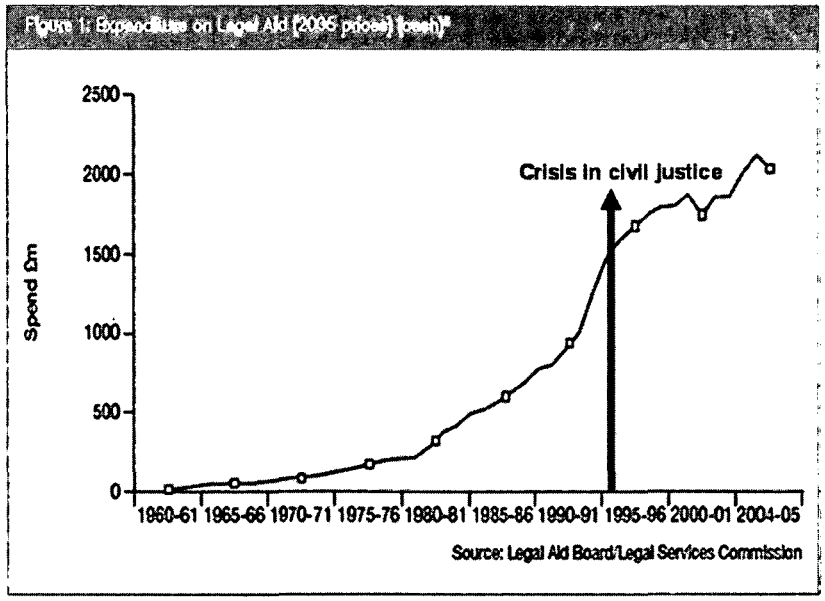
1. Judith Resnik & Dennis E. Curtis, *Representing Justice: From Renaissance Iconography to Twenty-First-Century Courthouses*, 151 PROCEEDINGS AM. PHIL. SOC'Y 139, 151 (2007).

2. Donoghue (or McAlister) v. Stevenson, [1932] A.C. 562 (Eng.).

review recommendations. The review process began in 1994 when the government[3] charged Lord Woolf with the job of producing a unified set of procedural rules for the High Court and County Courts, a task which then expanded to a full review of civil justice in response to a perceived "crisis" in civil justice. At the time of the review, complaints about the civil courts were not new. Since the nineteenth century, significant reforms of civil justice have been undertaken in order to improve the speed and accessibility of the civil courts, and during the twentieth century numerous reports were published proposing procedural change. A major review of the civil courts in 1989 preceded the Courts and Legal Services Act of 1990, which resulted in procedural innovations and modification of the relationship between the jurisdiction of the county courts and the High Court.

What then was new in 1994? From where did the sense of "crisis" in the civil justice system emanate, particularly at a time when the number of cases being issued in the High Court was actually decreasing? In my view, the sense of urgency about a review of the civil courts came less from any new problems in civil justice and more from concern about expenditure on legal aid, and, paradoxically, the rising cost of criminal justice. A central problem for the English government since the mid-1980s has been the rapid growth in the cost of legal aid and, in particular, criminal legal aid. Since its establishment in 1949, the underlying purpose of civil legal aid has been to provide access to justice so that the weak and powerless are able to protect their rights in the same way as the strong and powerful. In the criminal justice context, legal representation is considered necessary to ensure fairness for citizens prosecuted by the state with all of its resources. The history of legal aid expenditure has been of gradual and then exponential increases and the increase in the legal aid bill, which had been rising steadily throughout the 1980s, by the mid-1990s had started to look uncontrollable.

3. The review was initiated by the Lord Chancellor's Department (LCD), the government department responsible for the administration of justice. The LCD was subsequently renamed the Department for Constitutional Affairs (DCA) in 2003 and then renamed again in 2007 the Ministry of Justice.



That was not helped by criminal justice policy involving an extensive criminal legislative programme, greater emphasis on detection and enforcement, promotion of stronger crime control policies and emphasis on custodial sentences. Although these policies may be entirely appropriate for criminal justice objectives, in a fixed justice budget that has to accommodate both the rising cost of criminal justice and the civil justice system, such policies will inevitably place pressure on resources for civil justice.

The determination to hold down expenditure on civil justice had already been signalled in the Courts and Legal Services Act 1990, which had effectively modified the historic ban on champerty by permitting conditional fee arrangements—the beginning of the "no win, no fee" system for financing a limited range of civil claims.[4] Such arrangements were heralded as increasing access to justice for middle-income potential litigants.

Thus, the motivations for the 1994 to 1996 civil justice review were mixed. On the one hand there was justifiable interest in simplifying some of the complexities of the civil justice system and in rendering it more accessible and less costly for both business and private litigants. From the government's point of view, reform of the system might offer the

4. Courts and Legal Services Act, 1990, § S58 (U.K.). Conditional fee arrangements were originally permitted only for personal injury, insolvency and Human Rights actions.

potential for cost savings in general and in particular in relation to civil legal aid.

III. THE ENGLISH CIVIL JUSTICE REFORMS AND THE PLACE OF ADR

The review of English civil justice carried out by Lord Woolf and his advisers was conducted very swiftly. Only a year after the review was launched an *Interim Report* was published providing an analysis of "The Problems and Their Causes" and an outline of the main recommendations for change.[5] The analysis concluded that while the problems of cost, delay and complexity in civil justice were linked together, the principal cause of the shortcomings of the civil justice system was to be found in the behaviour of lawyers and their adversarial tactics.[6] The proposed solution involved judicial case management and measures to promote early settlement. A year later, the *Final Report*[7] was published together with a unified set of Civil Procedure Rules for the county courts and High Court. While the *Final Report* provided greater detail on the proposed reforms, the fundamental approach and new structure remained unchanged.

The solution to the problems of civil justice, therefore, lay in judicial case management, proportionate and rationed procedures, strictly enforced timetables, greater co-operation and less adversarialism, earlier settlements, and strong pressure to mediate applied through costs sanctions. Members of the judiciary were to become case managers responsible for rationing procedure, guided by principles of efficiency, equality of arms, and expedition.

In the "new landscape" of civil justice, alternative dispute resolution (ADR) was to have a central position. A fundamental premise of the *Final Report* was that court proceedings should be issued as a last resort, that all cases should be settled as soon as possible, and that ADR should be tried before and after the issue of court proceedings in order to achieve early settlement. While the 1995 *Interim Report* provided encouragement for litigants to consider using ADR, the tone was more directive in the 1996 *Final Report* which warns that:

> [T]he court will encourage the use of ADR at case management conferences and pre-trial reviews, and will take into account whether the parties have unreasonably refused to try ADR or behaved

5. LORD WOOLF, HER MAJESTY'S STATIONARY OFFICE, ACCESS TO JUSTICE: INTERIM REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES (June 1995) [hereinafter WOOLF, INTERIM REPORT].

6. *Id.* at paras. 4-31.

7. LORD WOOLF, HER MAJESTY'S STATIONARY OFFICE, ACCESS TO JUSTICE: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES (July 1996).

unreasonably in the course of ADR.[8]

ADR was promoted because it was deemed to have the advantage of saving scarce judicial resources, and because it was believed to offer benefits to litigants or potential litigants by being cheaper than litigation and producing quicker results.[9] The strength of the conviction that the public should be trying mediation rather than litigation was given expression in the Civil Procedure Rules, which conferred on the court the authority to order parties to attempt to settle their case using ADR and the judge the power to deprive a party of their legal costs if, in the court's view, the party has behaved unreasonably during the course of the litigation.[10] This discretion is of considerable significance when legal costs are often equal to, and may dwarf, the amount of money at stake in the dispute. The effect of the rules in relation to ADR is not to provide a direct incentive for parties to settle disputes by mediation, but to impose a future threat of financial penalty on a party who might be deemed to have unreasonably refused an offer of mediation.

Although Lord Woolf did not propose that ADR should be compulsory before or after the issue of proceedings, the inclusion in the Civil Procedure Rules of a judicial power to direct the parties to attempt ADR coupled with the court's discretion to impose a cost penalty on those who behave unreasonably during the course of litigation, has created a situation in which parties may feel that they have no choice.[11]

IV. POST-1996 MEDIATION DEVELOPMENTS

Government policy on mediation in relation to civil disputes initially rather lagged behind judicial enthusiasm and activism. But in the late 1990s, as pressure on justice budgets became more severe and legal aid expenditure continued to rise, ministers became more interested in the promise of mediation. In 1998 the new labour government signaled its interest in shifting dispute resolution attention away from the courts. In its landmark white paper, *Modernising Justice*, published in 1998, the government made clear that it was seeking to improve the range of options available for dispute resolution.

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8. *Id.*

9. WOOLF, INTERIM REPORT, *supra* note 5.

10. *See* CPR 1.4(2), 26.4 (stay of proceedings for settlement at the court's instigation). Factors to be taken into account when deciding costs issues include "the efforts made, if any before and during the proceedings in order to try and resolve the dispute." CPR 1, 44. In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including the conduct of the parties before and during the proceedings.

11. CPR 26.4, 44 ("The court will encourage the use of ADR at case management conferences and pre-trial reviews, and will take into account whether the parties have unreasonably refused to try ADR.").

While the *Final Report* on civil justice reforms and the new Civil Procedure Rules were published in 1996, the reforms were not implemented until April 1999. Ominously, the implementation of the CPR coincided with the most major changes to Legal Aid to have been introduced since the scheme's establishment in 1949. In the misleadingly named Access to Justice Act 1999, legal aid for civil cases was effectively swept away and replaced with no-win, no-fee arrangements for most money claims. The 1999 Act did many things, but increasing access to justice was not one of them. The 1999 Act manifested the government's determination to promote mediation by including the cost of mediation within the legal aid system and signaling that parties should first try ADR options before seeking legal aid for legal representation.

This emphasis on mediation has been reinforced in subsequent documents and through the Legal Services Commission's Funding Code, the 2005 version of which indicates that "an application for funding may be refused if there are complaint systems, ombudsman schemes or forms of alternative dispute resolution which should be tried before litigation is pursued."[12] The ADR section of the Code's Decision-Making Guidance states interestingly that "all forms of ADR are accepted to have *at least equal validity* to court proceedings" and goes on to point out that decisions about legal aid may be contingent on willingness to enter mediation.[13] Moreover, the Guidance contains a clear preference for mandatory mediation as a means of overcoming the apparently frustrating and inexplicable preference of parties to litigate—or at least to initiate court proceedings:

> Most solicitors or clients who are considering or are engaged in litigation seem to prefer to continue litigating rather than attempting mediation. The Commission believes that it is in the interests of clients for more non-family cases to attempt mediation and that some solicitors or clients will not properly consider mediation unless required to do so.[14]

V. COURT-BASED MEDIATION SCHEMES

In the wake of the civil justice reforms and following the lead provided by Lord Woolf, several enthusiastic judges in courts around England collaborated with mediation providers to set up mediation schemes offering no- or low-cost, time-limited mediation, held on court premises for litigants who had already commenced court proceedings. The first and

12. Legal Services Commission, 2005 Funding Code, Criterion 5.4.3.

13. Legal Services Commission, Funding Code Guidance Amendments: 'A New Focus for Civil Legal Aid,' Non-Family Guidance, Part 7 (2005) (emphasis added).

14. *Id.* at S.7.6(6).

largest of these court-based mediation schemes was established in a county court trial centre in central London (Central London County Court) in 1996. Although the courts administered the schemes, the mediations themselves were undertaken by trained mediators, initially on a pro bono basis by trained mediators keen to try out their newly acquired skills.

As part of its programme of promoting mediation, the government invested quite heavily in evaluating a number of court-based mediation schemes and we have therefore learned quite a lot about mediation of civil disputes.[15] We know, for example, that despite the promotion of mediation and the pressure exerted by the judiciary, there has been a relatively weak "bottom-up" demand even for very low-cost, court-linked mediation schemes. That is particularly so for cases involving personal injury where historically the vast majority of cases have settled without adjudication. Although mediation as a process is generally compared with trial and adjudication, the challenge for mediation policy since the mid-1990s has been that it is seeking to encourage facilitated settlement in a system in which settlement is in any case the norm. Since most cases settle, mediation is principally offering the possibility of accelerated settlement, but in the early stages of a dispute at least, many litigants may not be ready to compromise, which is what mediation largely demands.

As far as party satisfaction is concerned, evaluations of court-annexed mediation schemes show high levels of satisfaction among those who have *volunteered* to enter the process. When disputing parties discuss the positive aspects of mediation, they generally do so by comparing it with what they imagine a trial might have been like. That tendency to compare mediation experiences with what might have happened at a trial is largely generated and reinforced by the mediation process. In a typical mediation, one of the main tools for achieving settlement is for the mediator constantly to remind parties of the "dangers" of not settling on the day and the unpleasantness that awaits them if they continue to litigate and run the risk of proceeding through to trial.

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15. M. DOYLE, DEP'T FOR CONSTITUTIONAL AFFAIRS, MANCHESTER SMALL CLAIMS MEDIATION SCHEME EVALUATION (2006); J. ENTERKEN & M. SEFTON, DEP'T FOR CONSTITUTIONAL AFFAIRS, EVALUATION OF READING SMALL CLAIMS MEDIATION SCHEME (2006); HAZEL GENN, DEP'T FOR CONSTITUTIONAL AFFAIRS, CENTRAL LONDON PILOT MEDIATION SCHEME, EVALUATION REPORT (1998) [hereinafter GENN, CENTRAL LONDON EVALUATION]; HAZEL GENN ET AL., MINISTRY OF JUSTICE RESEARCH SERIES 1/07, TWISTING ARMS: COURT REFERRED AND COURT LINKED MEDIATION UNDER JUDICIAL PRESSURE (2007) [hereinafter GENN ET AL., TWISTING ARMS]; S. PRINCE, DEP'T FOR CONSTITUTIONAL AFFAIRS, EVALUATION OF EXETER SMALL CLAIMS MEDIATION SCHEME (2006); S. PRINCE & S. BELCHER, DEP'T FOR CONSTITUTIONAL AFFAIRS, AN EVALUATION OF THE EFFECTIVENESS OF COURT-BASED MEDIATION PROCESSES IN NON-FAMILY CIVIL PROCEEDINGS AT EXETER AND GUILDFORD COUNTY COURTS (2006); L. WEBLEY, P. ABRAMS & S. BACQUET, DEP'T FOR CONSTITUTIONAL AFFAIRS, EVALUATION OF BIRMINGHAM FAST AND MULTI TRACK MEDIATION SCHEME (2006).

On the question of speed and cost, of large-scale data analysis from court-based mediation schemes compared with control data provides no evidence to suggest any difference in case length durations between mediated and non-mediated cases.[16] The same analysis does, however, show that time limited mediation can avoid trials in cases not involving personal injury, either through immediate settlement or through bringing the parties closer to settlement so that they can settle before trial.[17] The perceptions of mediators, parties, and their lawyers is that successful mediation can save costs, but it is difficult to estimate how much, since, although the touchstone is always trial, the overwhelming majority of cases would not proceed to trial and would not therefore incur the costs of trial.[18] On the other hand, it is also clear that unsuccessful mediation may *increase* the costs for parties (estimated at between 1,500 and 2,000 pounds)[19] and this fact raises serious questions for policies that seek to pressure parties to enter mediation unwillingly.[20]

The other important lesson from mediation programmes for civil and commercial disputes is that most settlements involve simply a transfer of money. Only a small minority of settlements are in any way creative or provide something different from what would be available in court. It also seems clear that claimants significantly discount their claims in reaching mediated settlements.[21] There is a price to pay in terms of substantive justice for early settlement.

Evidence from evaluation of mediation schemes also revealed that the interest of mediating parties was primarily in *outcome*, not in the mediation *process*. It was not about repairing relationships, creative settlements, or the resolution of deep conflicts. What many parties actually want is "a fair, inexpensive and rapid *adjudication* of their claims."[22] Parties mediate because they have been told that what they want is not available, and that by mediating they can quickly and cheaply achieve some sort of end to the dispute.

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16. GENN ET AL., TWISTING ARMS, *supra* note 15, at 71.

17. *Id.* 73.

18. *Id.* 107.

19. *Id.* 110, 183.

20. For results of a recent evaluation of judicial mediation in employment discrimination disputes, which found no saving in cost or time, see also PETER URWIN ET AL., MINISTRY OF JUSTICE RESEARCH SERIES 7/10, EVALUATING THE USE OF JUDICIAL MEDIATION IN EMPLOYMENT TRIBUNALS (March 2010). The study found that judicial mediation was an expensive process to administer and was not offset by the estimated benefits (both direct and indirect) of the process.

21. GENN, CENTRAL LONDON EVALUATION, *supra* note 15, at 71; WEBLEY ET AL., *supra* note 15, at 70-71.

22. GENN, CENTRAL LONDON EVALUATION, *supra* note 15, at 155.

VI. PREDICTING SETTLEMENT

Not all mediated cases result in settlement. Settlement rates in court-based mediation schemes have varied[23] and statistical analysis of a large number of mediated cases in civil disputes shows that it is difficult to predict which factors lead to settlement, or, indeed, inhibit settlement. It seems that factors which are difficult to quantify—such as personalities, depth of grievance, degree of conflict, willingness to negotiate and compromise—all play a part. Indeed, analyses of the outcome of mediation in these court-based schemes show that the readiness of parties to mediate is an important factor in settlement.[24] Put simply, cases are more likely to settle at mediation if the parties enter the process voluntarily rather than being pressured into the process and increased pressure to mediate depresses settlement rates. Thus one broad conclusion of evaluation research has been that facilitation and encouragement together with selective and appropriate pressure are likely to be more effective and possibly efficient in producing settlements than blanket coercion to mediate.

These findings chime with learning from court-based mediation programmes in the Netherlands where it is argued that "[t]he only reliable predictor of potential success is the motivation of the parties themselves."[25] In her comprehensive analysis of effective court referral to mediation, Judge Machteld Pel argues that successful referral to mediation depends on appropriate analysis of the nature of the dispute or conflict. She says that "the degree of escalation of a conflict is an important indicator of the applicability and potential effectiveness of mediation." According to Pel, commercial disputes in which there is more likely to be a difference of opinion than a deep-seated conflict are better suited to round-table settlement negotiations than mediation. In Pel's analysis, while mediation is more appropriate for cases involving conflict, susceptibility to settlement and prospects for success decrease as the depth of the conflict increases, and there are some cases where only adjudication and coercion are capable of bringing an end to the dispute. Whether or not one agrees with Pel's analysis, it is instructive to note that in the Netherlands it is accepted that dispute or conflict diagnosis is a necessary step in determining whether a dispute is or is not appropriate

23. *See* studies discussed *supra* note 15.

24. This emerges from the findings of the ARM pilot and analyses of the voluntary mediation scheme at Central London County Court where the settlement rate declined from the high of sixty-two percent in 1998 to below forty percent in 2000 and 2003. This interpretation for the falling settlement rate is supported by the views of mediators interviewed for that study. *See* GENN ET AL., TWISTING ARMS, *supra* note 15.

25. MACHTELD PEL, THE HAGUE, REFERRAL TO MEDIATION: A PRACTICAL GUIDE FOR AN EFFECTIVE MEDIATION PROPOSAL ch. 1 (2008).

for referral to mediation.

VII. MANDATORY MEDIATION IN CIVIL DISPUTES

In the years after the introduction of the civil justice reforms, while the uptake of mediation was slow and steady, there was not the sudden rush to mediate that had been expected or hoped for by mediation enthusiasts. Perhaps in frustration at this slow start and presumably intending to push things along, in 2002 and 2003 judges in the Court of Appeal and High Court handed down a series of decisions underlining the importance of ADR and the need for parties to take it seriously.

In *Cowl*,[26] in 2002, Lord Woolf held that parties must consider ADR before starting legal proceedings, particularly where public money was involved. That was followed more significantly by *Dunnett v. Railtrack*,[27] in which the Court applied Part 44 of the CPR and denied the successful defendant their legal costs on the ground that their refusal to contemplate mediation prior to the appeal (after it had been suggested by the Court) was unreasonable. The message of *Dunnett v. Railtrack* was reinforced in the later case of *Hurst v. Leeming*[28] in which Mr. Justice Lightman held that it is for the court to decide whether a refusal to mediate was justified. In a frequently repeated statement he argued that "mediation is not in law compulsory, but alternative dispute resolution is at the heart of today's civil justice system."[29] He went on to threaten that an unjustified failure to consider mediation would attract adverse consequences.

Another case in 2003 confirmed the risks for parties if they unreasonably refused to try ADR or withdrew unreasonably from an ADR process.[30] However, the high-water mark in the line of cases came in May 2003 when the High Court made another significant decision in relation to the use of ADR. The case of *Royal Bank of Canada Trust Corp. v. Secretary of State for Defence*,[31] centred on a point of law relating to a lease. The claimant was willing to try to resolve the dispute by ADR, but the Ministry of Defence rejected the suggestion on the ground that the dispute involved a point of law that required a "black and white" answer. In the High Court, the Ministry was successful on the point of law, but the judge refused to award the Ministry its legal costs as a result of its refusal

26. Cowl and Others v. Plymouth City Council, [2001] EWCA (Civ) 1935 (Eng.).

27. [2002] EWCA (Civ) 2003 (Eng.).

28. [2001] EWHC (Ch) 1051 (Eng.). This judgment was given on May 9, 2002, after the *Dunnett* decision.

29. *Id.*

30. Leicester Circuits Ltd. v. Coates Brothers PLC, [2003] EWCA (Civ) 290 (Eng.) (withdrawing from mediation is contrary to the spirit of the Civil Procedure Rules).

31. [2003] EWHC (Ch) 1479 (Eng.).

to mediate. The judge stated that the reason given for refusing mediation (that the case involved a point of law) did not make the case unsuitable.[32]

Although Lord Woolf had not been in favour of compulsory mediation, commercial providers and other mediation enthusiasts have not shared his concerns. By 2003, frustration at the low voluntary uptake of mediation in civil disputes and unease about the number of trained mediators without work led mediation providers to press the government to take a more radical approach. It was argued by a coalition of mediation practitioners and judges that a pilot compulsory mediation scheme should be set up. The justification for such a step was that even if disputing parties were forced against their will to undergo a mediation experience, the attractions of the process would overcome resistance and the parties would be likely to settle. Moreover, compulsion would rapidly expose a large number of people to the positive experience of mediation, thus leading to the kind of "take-off" that had to date been elusive. Positive experience in Canada of a large mandatory mediation programme for civil disputes gave some credence to this argument,[33] and in March 2004, a one-year mandatory pilot scheme was set up in Central London County Court where the voluntary scheme had been running for some years. Cases were automatically referred to mediation (ARM) and while it was possible for parties to object to the referral, any unreasonable refusal to mediate would lead to costs sanctions.

Unfortunately, the launch of the scheme precisely coincided with a ruling by the Court of Appeal in the case of *Halsey*[34] that the court had no power to compel parties to enter a mediation process. It is difficult to assess precisely what impact the *Halsey* judgment had on the behaviour of those who were automatically referred to mediation during the course of the pilot, but there can be little doubt that the judgment did not help. The result of the pilot was almost exactly the opposite of what happened in Canada. While the Canadians experienced only a handful of cases in which the parties opted out of the mandatory mediation scheme, in the ARM pilot about eighty percent of those referred to mediation objected to the referral; following the *Halsey* judgment, the court seemed to be uneasy about forcing people to mediate against their will. Indeed, it was a

32. CEDR, the leading commercial mediation provider organization, commenting on the decision, said that it "follows in a direct line from *Dunnett v. Railtrack*, *Hurst v. Leeming*, and *Leicester Circuits v. Coates Industries*, providing further examples of failed arguments to avoid mediation. More specifically, the case makes it clear that it is dangerous for a government party to ignore its own public undertaking to use ADR." *Public Sector—A Culture Change?* 32 RESOLUTIONS, Summer 2003, at 6, *available at* http://www.cedr.co.uk/news/resolutions/resolutions32.pdf.

33. R. G. HANN & C. BAAR, ONTARIO MINISTRY OF THE ATTORNEY GEN., EVALUATION OF THE ONTARIO MANDATORY MEDIATION PROGRAM (RULE 24.1): FINAL REPORT—THE FIRST 23 MONTHS (March 2001).

34. Halsey v. Milton Keynes General NHS Trust, [2004] EWCA (Civ) 576 (Eng.).

classic example of policies colliding and of the danger of extrapolating from one culture to another. The applicability across jurisdictions of procedural innovations depends on, among other things, the culture of litigation, the formal court structures for dispute resolution, the characteristics of disputes, and costs rules.

A decision that the pilot had been largely unsuccessful was effectively made after the experience of the first six months, although the scheme was allowed to run its course for a full year before being abandoned. What is instructive, however, in the current context is the fact that despite the failure of the ARM pilot, the appetite for mandatory mediation for civil disputes continues among mediators, the judiciary, and the Ministry of Justice, and is now being revived in England for family disputes.

VIII. REFLECTIONS

Although the intention of the civil justice reforms was to reduce delay, complexity and cost in the civil justice system, the evidence suggests that some of the key objectives have not been met. While there have undoubtedly been some positive gains from the introduction of the reforms, it seems that the Civil Procedure Rules are as elaborate as ever and the cost of litigation has actually risen. Moreover, in my view there have been some dangerous unintended consequences of the reform process. The Access to Justice Reports contained confusing messages promising access to justice at the same time as launching deep criticisms of legal process and the legal profession. The formal promotion of mediation as a central element in the new civil justice system trivialised civil disputes that involve legal rights and entitlements and redefined judicial determination as a failure of the justice system rather than as its heart and essential purpose.

I am concerned that the case for mediation has routinely been made not so much on the strength of its own special benefits, but by setting it up in opposition to adjudication and promoting it through anti-adjudication and anti-law discourse. This reinforces the negative or jaundiced view of the legal process, which has been in ascendance in England since the mid-1980s.[35] Some members of the senior judiciary have played into the hands of the government by criticising the legal profession and arguing for

35. This was started by the conservative government but picked up with enthusiasm by the Labour Lord Chancellor, Derry Irvine, in 1997 and was being repeated in 2009 by the Lord Chancellor, Jack Straw. In March 2010 the *Daily Mail* newspaper reported Jack Straw saying that there are too many lawyers costing the taxpayer too much money. He said, "We are in grave danger of becoming over-lawyered and under-represented." Steve Doughty, *Britain Has Too Many Lawyers... Says Justice Chief (and Lawyer) Jack Straw*, DAILY MAIL, Mar. 23, 2010, http://www.dailymail.co.uk/news/article-1259926/Jack-Straw-says-Britain-lawyers.html (quoting Jack Straw) (internal quotation marks omitted).

diversion of cases into private dispute resolution. The messages that ADR processes are more desirable than legal determination have been enthusiastically adopted by the government. Indeed, we have witnessed a revolution in dispute resolution discourse. At the beginning of the twenty-first century, political arguments, judicial speeches, and policy pronouncements about how civil and family justice should be working now focus on how to encourage or force more people to mediate, on worrying about why more people are not mediating, and on promoting the value of mediation to the justice system and society as a whole.[36] This is a remarkable success story and the root of the mediation movement's rhetorical achievement can be found in its ability to communicate simple (if empirically unverified) messages to policy-makers struggling to manage justice system costs.

Despite the evidence that willingness to mediate is critical to achieving a settlement at the end of the mediation process, that there are financial and other costs to unsuccessful mediation, and that it is important to tailor dispute resolution processes to the dispute, the enthusiasm of policy-makers for mediation remains largely undimmed and in some jurisdictions it is becoming more pronounced with a growing interest in compulsory mediation for civil and family disputes.[37] Although the case for private mediation has traditionally been framed around process—quicker, cheaper, less stressful than trial—it is increasingly being presented not merely as a useful alternative or supplement to public courts, but as an equal or, indeed, *preferable* method of handling disputes. The terms of reference of the fundamental review of family justice launched by the British government in 2010 states explicitly that mediation is the preferred approach to dealing with disputes following relationship breakdown.[38] In Australia the National ADR Advisory Council (NADRAC), advising the Attorney General's Department on its *Strategic*

36. Lord Philips of Worth Matravers, Lord Chief Justice of England and Wales, Alternative Dispute Resolution: An English Viewpoint (Mar. 29, 2008) *available at* http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj_adr_india_290308.pdf; Lord Justice Clarke, Speech to Annual Mediation Council Conference (May 2008); *see also* DEP'T FOR CONSTITUTIONAL AFFAIRS, A NEW FOCUS FOR CIVIL LEGAL AID: ENCOURAGING EARLY RESOLUTION; DISCOURAGING UNNECESSARY LITIGATION (2004), *available at* http://www.dca.gov.uk/response-litigation.pdf (focusing on family cases and "discouraging unnecessary publicly-funded litigation"); Varda Bondy, Margaret Doyle & Val Reid, *Meditation and Judicial Review—Mind the Research Gap*, JUD. REV. (Sept. 2005), *available at* http://www.publiclawproject.org.uk/downloads/MindResGap.pdf.

37. This is true in Australia. *See, e.g.*, AUSTRALIAN GOVERNMENT, ATTORNEY GENERAL'S DEP'T, A STRATEGIC FRAMEWORK FOR ACCESS TO JUSTICE IN THE FEDERAL CIVIL JUSTICE SYSTEM 95-96 (Sept. 2009); *see also* the Attorney General's proposals to amend the Family Law Act of 1975 to permit mediators to be able to give an arbitral ruling in mediation if agreement cannot be reached.

38. *See* FAMILY JUSTICE REVIEW: TERMS OF REFERENCE (Jan. 2010), *available at* http://www.justice.gov.uk/news/docs/family-justice-review-terms-reference.pdf.

Framework for Access to Justice, is promoting mandatory mediation on the ground that "the more ADR is used successfully and is seen to provide benefits that cannot be achieved in litigation, the more receptive disputants and their lawyers will be to its use."[39]

This growing "preference" for private dispute resolution over public processes raises some profound questions about the role of judicial determination in common-law systems governed by the rule of law and presents a challenge to comfortable assumptions about the nature of *legal* disputes and the moral content of legal rights and interests. In attempting to establish private dispute resolution as a viable alternative to litigation or as an option within litigation, are we in danger of overestimating what mediation can offer to the range of civil and family disputes that are dealt with through the public justice system and of losing our sense of the public value of courts and what they stand for?

The role of law and the rule of law are fundamental to liberal democracies, which emphasize liberty and promise justice and equality before the law. Under the rule of law, law stands above all people and all people are equal before it. Access to justice is an essential element in the rule of law. Despite the private nature of ADR, it is argued that diverting legal disputes away from the courts and into mediation is, in fact, a strategy that will increase access to justice. But this is a claim that requires some scrutiny. Mediation does not contribute to access to the courts because it is specifically non-court-based. It does not contribute to substantive justice because mediation requires the parties to relinquish ideas of legal rights during mediation and focus, instead, on problem-solving. Mediators are not concerned about substantive justice because the mediator's role is to assist the parties in reaching a settlement of their dispute. The mediator does not make a judgement about the quality of the settlement. Success in mediation is defined in the mediation literature and by mediators themselves as a settlement that the parties "can live with." The outcome of mediation, therefore, is not about *just* settlement it is *just about settlement*. Moreover, a critical feature of ADR is its privacy. Both the process and outcome of the procedures are private and generally confidential to the parties, who pay themselves for the process. Like other types of out-of-court settlement, the terms of mediated agreements are not publicly known.

If the evidence about mediation is not wholly consistent and supportive of the claims made for it, why does mediation have such a grip on policy debate? A huge conflict resolution literature has developed in which

39. NAT'L ALT. DISPUTE RESOLUTION ADVISORY COUNCIL, THE RESOLVE TO RESOLVE—EMBRACING ADR TO IMPROVE ACCESS TO JUSTICE IN THE FEDERAL JURISDICTION: A REPORT TO THE ATTORNEY–GENERAL 25 (2009).

messages about mediation and caricatures of adjudication are constantly presented and re-presented. In this polarised world, judicial determination is seen as shackled to excessively adversarial procedure and competitive advocacy. Litigation is characterized as a single track to the trauma of trial conducted by lawyers possessing an attenuated range of primitive aggressive skills. The experience for disputing parties is portrayed as disempowering, miserable, and expensive.

Arguably, the power of the mediation message lies not only in the simplicity and consistency of its claims, but also in its virtual monopoly on new thinking. Mediation enthusiasts have seized the policy initiative and captured the imagination of thought-leaders while the legal profession and mediation sceptics have largely been spectators in this battle of ideas. The point is not to challenge and resist in order to preserve the status quo, but to engage in the debate, to argue for the benefits of public justice while recognizing where and how the public justice system and legal practice needs to change and to offer a realistic programme for improvement in order to meet the needs of disputing parties seeking justice through the legal system. The legal profession has developed new ways of working through collaboration and cooperation in family cases, but there is a need for more imaginative thinking in civil justice practice and procedure.

IX. COALITION POLICY: ACCELERATING THE TREND

In the decade following the implementation of the civil justice reforms in England we have been through several phases:

1. *Unwarranted euphoria*: during which phase the reforms were greeted as the final answer to the historic problems of civil justice;
2. *Denial:* during which phase individual practitioners began to whisper growing reservations, although it remained "politically incorrect" to voice doubts about aspects of the reforms;
3. *Grudging recognition*: during which phase it became acceptable to suggest that the hoped-for impact on costs had not been realized and that the CPR seemed to be getting rather cumbersome;
4. *Reflection and debate:* the phase that we have now entered, in which practitioners and the judiciary are reflecting on the learning of the past decade and considering what direction should be taken now to improve the system.

During the fourth phase, leading up to the general election of 2010, the Ministry of Justice seemed to be largely uninterested in civil justice

issues, with energies focused principally on the challenges of managing the criminal justice system. Save for continuing to argue for the diversion of civil and family disputes into private mediation, they had little to offer in the way of proposals for civil justice.

The outcome of the election in May 2010 was the creation of a coalition government, which brought together the right of centre Conservative Party and the left of centre Liberal Democrats—an odd coupling. Prior to the election, neither party had articulated coherent justice system policies outside of the sphere of crime and criminal justice. A review of pre-election manifestos reveals a sprinkling of proposals for family and civil cases, largely related to legal aid, and some suggestions about the need for further procedural change. The first clear policy statement from the new government was their "Transforming Justice" agenda. Set in the context of the global financial crisis and the need to save two billion pounds from the justice budget by 2014 to 2015, the government outlined its intention to reform legal aid, to simplify court processes, rationalise the court estate by closing courts, merge the administration of courts and tribunals, and focus policy on alternatives to court. These proposals were accompanied by a new civil justice rhetoric which presented court proceedings as an unnecessary drain on public resources, and public funding for civil and family disputes through legal aid as an incitement to litigate rather than a means of facilitating access to justice. For example: "The current system encourages lengthy, acrimonious and sometimes unnecessary court proceedings, at tax payers' expense, which do not always ensure the best result for those involved."[40]

Through a series of speeches and consultation documents since 2010, the coalition government has established a consistent party-line on civil justice which argues that people should solve their own problems rather than turning to the courts; that Britain has become a litigious society; that it is too easy to seek redress through the courts for "perceived injustice"; and that the courts are only intended for "genuine points of law" or threats to liberty or security.[41] We are told that the fiscal climate is forcing us to tighten our belts and that what we need is more mediation, although we are assured that mediation "is not just about cost-cutting and pushing

40. *Transforming Justice: Help for the Right People at the Right Time*, *available at* www.justice.gov.uk/about/moj/tj/help.htm (last visited Jan. 15, 2012).

41. Interestingly, this view seems to be reserved only for individual citizens and domestic business enterprises since the Ministry has recently developed a concurrent policy of promoting the British justice system and legal services to international commercial enterprises for the resolution of business disputes. *See, e.g.*, Justice Minister Ken Clarke, CityUK Future Litigation Event, Speech at the International legal firm, Clifford Chance (Sept. 2011), *available at* www.justice.gov.uk/downloads/about/moj/our-ministers-board/speeches/clarke-speech-future-litigation-140911.doc.

people away from the justice system."

In November 2010, the Justice Minister announced his proposals for changes to the provision of legal aid. The document suggested no significant changes to the scope of criminal legal aid, but a dramatic cutting-down of the scope of civil and family legal aid. In presenting these proposals, it was argued that the measures were necessary to "stop the encroachment of unnecessary litigation into society."[42] Arguing that the legal aid scheme in its current form "is no longer sustainable if the government is to reduce debt," the government proposes effectively to exclude from the ambit of legal aid most civil and family cases. What is particularly troubling is the way that arguments about mediation are woven seamlessly into the justificatory fabric. The Minister tells us that "the courts should not be used as arenas of conflict, argument and debate when a more mature and considered discussion of the issues at hand between parties could see a better outcome for them."

The implicit argument runs something along these lines: sensible people resolve their disputes through discussion, not by going to court; mediation provides the opportunity for such mature and considered discussion; legal aid encourages people to go to court rather than have these mature discussions and so creates a barrier to dispute resolution rather than facilitating it; thus removing legal aid constitutes a social benefit.

A coordinated campaign supported by the legal profession and advice sector is in progress to oppose the proposed changes, but the realistic hope is simply to achieve damage limitation.[43]

In March 2011 the Ministry of Justice published a further set of proposals as part of the "Transforming Justice" agenda. These focused on changes to procedure in the civil courts.[44] The title of the paper "Solving Disputes" communicates the current philosophy and approach, which is to represent the cases that come to court for determination on the merits as problems in search of resolution—the message and language of mediation. The paper refers back explicitly to the Woolf Access to Justice Report. It poses the rhetorical question: "What has gone wrong with civil justice?" and answers its own question by reference to Woolf. It reminds us that the fundamental premise of the Woolf Reforms was that court

42. *See, e.g.*, MINISTRY OF JUSTICE, PROPOSALS FOR THE REFORM OF LEGAL AID IN ENGLAND AND WALES (Nov. 2010), *available at* http://www.justice.gov.uk/downloads/consultations/legal-aid-reform-consultation.pdf.

43. *See* JUSTICE FOR ALL, http://www.justice-for-all.org.uk/ (last visited Feb. 11, 2012).

44. MINISTRY OF JUSTICE, SOLVING DISPUTES IN THE COUNTY COURTS: CREATING A SIMPLER, QUICKER AND MORE PROPORTIONATE SYSTEM (Mar. 2011), *available at* http://www.justice.gov.uk/downloads/consultations/solving-disputes-county-courts.pdf [hereinafter MINISTRY OF JUSTICE, SOLVING DISPUTES].

proceedings are not the best or most appropriate route for civil disputes. The paper goes on to argue that "far too many cases are going to court unnecessarily" and that many cases settle between issue and trial, which is deemed to be a "waste of court resources and judicial time."[45] That suggestion conveniently fails to acknowledge that it is only the threat of coercion that brings defendants to the negotiating table.[46]

Perhaps the most worrying aspect of the tone of the paper is its rejection of the language of justice. We are told that the court system needs to "focus more on dispute resolution . . . for the majority of its users, *rather than the loftier ideals of 'justice,'* that cause many to pursue their cases beyond the point that it is economic for them to do so."[47]

We are told that the policy objective is to create yet another "new" civil justice system. The characteristic of this new justice system is that it will be one "where many more avail themselves of the opportunities provided by less costly dispute resolution methods, such as mediation—to collaborate rather than litigate."[48] So not a "justice" system at all, or at least not one that is concerned with substantive justice.

In order to achieve this change the proposal is effectively to impose compulsory mediation by drastically increasing the scope of the simplified small claims procedure so that most civil cases will fall within that jurisdiction and then to insist that all claims go through mediation before being considered for judicial determination.

X. JUDICIAL FIGHT BACK? TOO LITTLE, TOO LATE

What we are now seeing is a bifurcation between the views of the senior judiciary and policymakers. The judiciary is beginning to display some nervousness about the emphasis on private dispute resolution. More than a decade after the reforms of civil justice, with resources for civil justice severely strained and a change in the leadership of the judiciary, we are hearing a more nuanced analysis of the issues. For example, in an address to the Civil Mediation Council's annual conference shortly after his appointment in 2009, the Lord Chief Justice emphasised the need for an effective civil justice system and hinted at some concerns about the prospect of compulsory mediation:

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45. *Id.* at 9.

46. We know that judicial determination is not necessary to settle every case, and we know from research and judicial statistics that the vast majority of civil cases in which formal proceedings are issued eventually settle without a judicial determination. But without that threat, without the potential to institute proceedings, claimants would not be in a position to settle their disputes. They would be left without a remedy. For discussion of settlement rates in county court litigation, see HAZEL GENN ET AL., TWISTING ARMS, *supra* note 15, at 57-61.

47. MINISTRY OF JUSTICE, SOLVING DISPUTES, *supra* note 45, at 7 (emphasis added).

48. *Id.* at 1.

> If I were to enter into the debate on whether the court process could or should have the power to compel mediation, in effect as part of its own process, I should have to speak for a very long time. . . . [O]n this I have to confess to an underlying concern not so much directed at the mediation issue, which is about too many people telling too many other people what they must do and thus compel an additional step in the process of litigation.[49]

At the same conference a year later, Lord Neuberger, the Master of the Rolls and Head of Civil Justice, also gave rather more cautious support for the mediation "project" than that expressed by his two immediate predecessors:

> [L]et us not get carried away by zeal. Zeal for justice, zeal for one's client are fine, but zeal for a form of dispute resolution or any other idea, theory, or practice is not so healthy. It smacks of fanaticism, and it drives out one of the three most important qualities a lawyer should have—scepticism or, if you prefer, objectivity. (The others being honesty and ability.) Overstating the virtues of mediation will rebound in the long term, even in the medium term, to the disadvantage of mediation.[50]

In his recent comprehensive review of costs in civil litigation, Lord Justice Jackson considered the role of mediation in the resolution of civil disputes. He rejected the submission by mediation providers that procedural judges should impose sanctions on parties who had not mediated prior to the issue of proceedings without a good reason. He also rejected the suggestion that "compulsion may even be needed" to ensure that procedural judges implement such a policy. Lord Justice Jackson favoured an approach that would support education and facilitation of ADR rather than coercion.

Most recently, Lord Neuberger has sought to emphasise the public purpose of courts and to reject the notion that judicial determination represents a failure of the justice system rather than being fundamental to its purpose. There seems to be some deeper thinking going on about what it means to deliver justice in the realm of civil disputes. He argued that neither arbitration nor ADR can provide a framework for securing the enforcement of rights and the rule of law and that without the framework provided by formal adjudication "they would be mere epiphenomena."[51] In November 2010 Lord Neuberger gave a speech, which he

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49. Lord Igor Judge, Lord Chief Justice, Speech to the Third Civil Mediation Council National Conference (May 14, 2009).

50. Lord Neuberger of Abbotsbury, Speech at the Fourth Civil Mediation Council National Conference: Educating Future Mediators (May 11, 2010).

51. Lord Neuberger of Abbotsbury, The Fourth Keating Lecture: Equity, ADR, Arbitration and The Law: Different Dimensions of Justice (May 19, 2010).

provocatively entitled "Has Mediation Had its Day?"[52] He argued that the increasing emphasis on mediation and ADR may well be "antipathetic to our commitment to equal access to justice, to our commitment to a government of law."[53] He went on: "Citizens are bearers of rights; they are not simply consumers of services. The civil justice system exists to enable them to secure those rights. It does not exist to merely supply a service, which like a bar of chocolate may be consumed."[54]

Other commentators are beginning to wade into the "wretched waters"[55] of civil justice. In June 2011 the campaigning organization Justice issued an intentionally powerful press release warning that the combined effect of changes to legal aid together with compulsory mediation will be the "economic cleansing" of the civil courts. The statement argued that in the future "courts and lawyers will be only for the rich. The poor will make do as best they can with no legal aid and cheap, privatised mediation. There will be no equal justice for all—only those with money."

In a relatively unusual departure from normal practice, the Supreme Court Justice Lady Hale has been contributing to the debate. She has made two recent, high-profile speeches in which, in the context of proposed changes to legal aid, she has argued that access to justice is a constitutional principle:

> We are a society and an economy built on the rule of law. Businessmen need to know that their contracts will be enforced by an independent and incorruptible judiciary. But everyone else in society also needs to know that their legal rights will be observed and legal obligations enforced. . . . If not, the strong will resort to extra-legal methods of enforcement and the weak will go to the wall.[56]

Those concerns are well-founded. As a byproduct of economic expedience and the relentless movement away from public adjudication to private dispute resolution, we are not merely losing the courts and access to them; we are losing the language of justice in relation to a very wide range of issues affecting the lives of citizens.

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52. Lord Neuberger of Abbotsbury, The Gordon Slynn Memorial Lecture 2010: Has Mediation Had Its Day? (Nov. 11, 2010), *available at* http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/moj-speech-mediation-lectureA.pdf.

53. *Id.*

54. *Id.*

55. *See* SIR JACK JACOB, THE FABRIC OF ENGLISH CIVIL JUSTICE 246 (1987) (using the term).

56. Lady Hale, Justice of the Supreme Court of the United Kingdom, Opening Address at Law Centres Federation Annual Conference (Nov. 28, 2011), *available at* http://www.supremecourt.gov.uk/docs/speech_111125.pdf.