

WHY THE PRIVATISATION OF CIVIL JUSTICE IS A RULE OF LAW ISSUE

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My theme this evening is a long-term trend in our civil justice system that seems to have accelerated over the past 15 years – namely the decline, and now virtual extinction - of trials in the civil courts and with it public determination of the merits of civil disputes. While settlement in the shadow¹ of the common law has always been the typical mode of dispute resolution of civil cases in England, as a society we have benefited, historically, from a steady flow of cases, publicly adjudicated, which have developed and enriched common law principles regulating social and commercial behaviour. But since the late 1990s there has been a wholesale shift in the resolution of civil [and family] disputes out of the public realm, into private settlement and to private dispute resolution services. It isn't just that the absolute number of trials has dropped, but that court proceedings are much more rarely being started. Civil disputes are now not coming near the courts. This is not to suggest that the public courts and our judiciary are not busy – they are. But they are not busy making final determinations on the merits of private law claims by citizens and business. They are increasingly dealing with public law cases involving relations between the citizen and state – essentially criminal and administrative law issues.

While this picture is radically different from say Germany, Austria, France and Belgium² where a high proportion of civil disputes are dealt with in public courts, we are not unique in this respect among common law jurisdictions. The puzzle of the “vanishing trial” and the privatization of civil justice has been the subject of academic debate in numerous North American symposia and special issues of scholarly journals over the past decade, although there has been an intensification of writing and concern in recent years.³ Similar disquiet

¹ See R. H. Mnookin and L. Kornhauser, 'Bargaining in the shadow of the law: The case of divorce', *Yale Law Journal*, 88 (1979), 950–97; See also L. M. Friedman, 'The Day Before Trials Vanished', *Journal of Empirical Legal Studies* 1(3) (2004) 689-703, at p.689 '... the “trial” was never the norm, never the modal way of resolving issues and solving problems in the legal system'..

² Felix Steffek, Hannes Unberath, with Hazel Genn and Reinhard Greger (eds), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, Hart Publishing, 2013.

³ For early discussion see Owen M Fiss, 'Against Settlement', 93 *Yale L.J.* 1073; David Luban, 'Settlements and the Erosion of the Public Realm', 83 *Geo. L.J.* 2619. More recently see The Vanishing Trial, *Journal of Empirical Legal Studies* Symposium and Special Issue: Galanter, M. 'The Vanishing Trial: An Examination of trials and Related Matters in Federal and State Courts', *Journal of Empirical Legal Studies*, 1(3) (2004), 459-570; H. M. Kritzer, 'Disappearing Trials? A Comparative Perspective', *Journal of Empirical Legal Studies*, 1(3) (2004) 735–754, p. 752; Paul Butler, 'The Case for Trials: Considering the Intangibles', *J. Empirical Legal Stud* 1(3) (2004) 627-636; Stephan Landsman, 'So What? Possible Implications of the Vanishing Trial Phenomenon', 1(3) (2004)

has been expressed in Canada and Australia,⁴ but so far the vanishing trial phenomenon has passed largely unnoticed, unquestioned and little remarked upon in England & Wales.⁵

Although we might think that this development is nothing to be concerned or particularly excited about, there is something paradoxical about the phenomenon of disappearing trials occurring at a time when law is apparently proliferating – reaching into every aspect of business, private and public life and when rights talk and law talk are everywhere. It is, indeed, fascinating that this development occurs at a time when we are berated by Government for failing to take responsibility for our disputes, for being overly litigious and for fostering a compensation culture.⁶

What I propose to do this evening, is first to describe what seems to have happened (in so far as is possible in the absence of any adequate statistics about the operation of the public justice system); second to speculate on why it has happened (speculation being necessary since we have no statistics or empirical research that would support a rigorous understanding of the trend); and finally to reflect on the possible consequences of this phenomenon for the operation of the rule of law, the development of the common law, public confidence in law and the justice system, and public compliance with the law.

Part of the stimulus for this reflection has been my 15 year irritation with Government rhetoric around civil justice and the failure to understand, first the extent to which the civil courts support social order and economic activity; and second the protective function of the civil justice system in relation to the rights of citizens and business vis a vis other citizens and businesses.⁷ The justice system has both dispute resolution and behaviour modification functions. Essentially, the civil courts in a common law system provide much of the legal structure for the economy to operate effectively and for peaceful, authoritative and coercive termination of disputes between citizens, companies and public bodies. Most recently I have been troubled by proposals due to take effect from April 2013 which will combine the exclusion of civil (and most family) claims from the ambit of the legal aid

J. Empirical Legal Studies, 973-984; Thomas J. Stipanowich, 'ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution"', 1(3)(2004) J. Empirical Legal Studies, 843–912; Marc Galanter, 'A World Without Trials', *Journal of Dispute Resolution*, 7 (2006) 7-34;

⁴ Trevor Farrow, *Civil Justice, Privatization and Democracy* (March 25, 2011). Available at SSRN: <http://ssrn.com/abstract=1795407> ; Julian Gruin, 'The rule of law, adjudication and hard cases: The effect of alternative dispute resolution on the doctrine of precedent', (2008) 19 ADRJ 206; J.J. Spigelman, *Judicial accountability and performance indicators*, Civil Justice Quarterly, 2002.

⁵ Exceptions are Hazel Genn, *Judging Civil Justice*, Hamlyn Lectures 2008, Cambridge University Press, 2009; R. Dingwall and E. Cloatre, 'Vanishing Trials? An English perspective', 1 *Journal of Dispute Resolution*, 51, (2006).

⁶ For example see Ministry of Justice *Proposals for the reform of legal aid in England and Wales Cm7967* November 2010; and *Solving disputes in the county courts: creating a simpler, quicker and more proportionate system*, A consultation on reforming civil justice in England and Wales, Consultation Paper CP6/2011, Ministry of Justice, March 2011

⁷ See the discussion by J. A. Jolowicz in 'On the Nature and Purpose of Civil Procedural Law', Chapter 3 in J. A. Jolowicz, *On Civil Procedure*, (Cambridge University Press, 2000).

scheme with mandatory diversion to private mediation for a vast swathe of disputing parties who have brought their cases to the county courts for judicial determination.⁸ [This has been referred to rather dramatically as the economic cleansing of the civil courts.]⁹

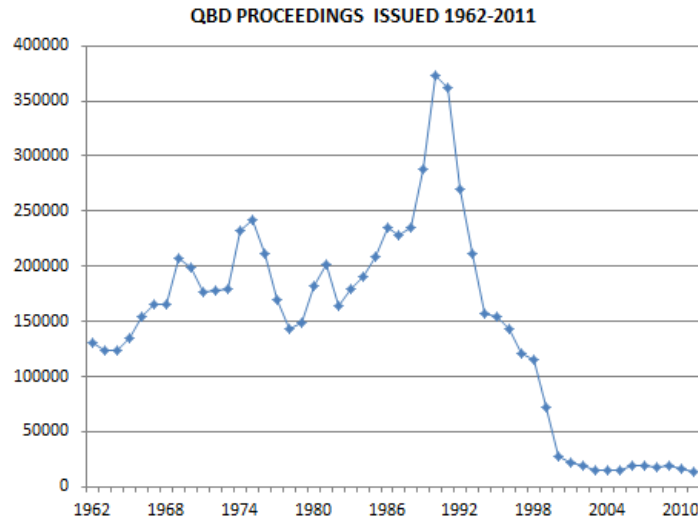
I have spent over 30 years hanging around courts, reading case files and talking to parties involved in disputes and, more recently, those involved in mediation processes. My observations and concerns are not merely theoretical, but have developed very directly from interactions with users and potential users of the civil justice system.

My argument this evening is that as a result of a number of pressures, we have witnessed the removal of most civil disputes from the public justice system with consequences that are, as yet, unknown and undocumented. Whether we believe that this is a socially positive or negative development, we need more information about why it has happened and what the long term consequences might be. And since, through my title, I have laid my cards on the table, I will say now that my own view is that this is not a positive social development; that in the long term it may lead to a lack of clarity in important areas of private law; that it has the potential to undermine the rule of law and that, together with the barriers that are being erected to access to justice for citizens, it will have a corrosive influence on public respect for and compliance with obligations and responsibilities under the law, and provide encouragement to those who would flout their legal responsibilities.

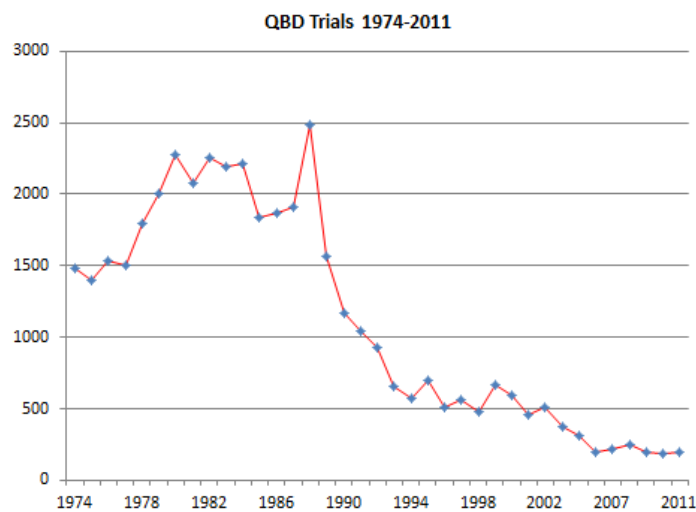
So, to The Vanishing Trial: What we do know? Although HMCTS provides weak statistical data on the civil justice system, I have managed to pull together data from various sources to provide some stark context for the discussion. The figures provide some simple images which pretty much speak for themselves.

⁸ Solving Problems in the County Courts 2011, op cit.

⁹ Roger Smith, JUSTICE press release on legal aid and county court changes, 2011.



The first chart shows the issue of proceedings in the QBD (excluding the Administrative Court) and reflects the basic run of private law disputes. During the period between 1938 and 1990 we see a steep increase in the number of cases being commenced in the QBD. But in common with other jurisdictions around the world, since the mid-1990s England has witnessed a reduction in the number of cases being issued in court and in the absolute number of cases coming to trial for authoritative adjudication [Chart 2 QBD Trials].¹⁰

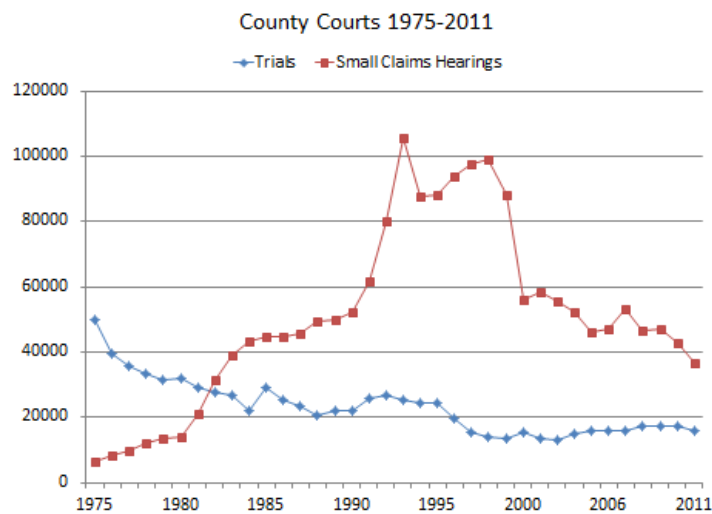


This trend is most marked in the High Court, but it is also evident in the county courts. The 2011 figures for the QBD show a continuing downward trend in proceedings being issued since 1998 and, although one can't see this clearly, there has been a 24% decline in numbers

¹⁰ There has been a significant downturn in trials dating back to 1955. See further, H. Kritzer, 'Disappearing Trials? A comparative perspective' 1 *Journal of Empirical Legal Studies*, 735 (2004); H. Genn, *Judging Civil Justice*, op cit, Chapter 2; R. Dingwall and E. Cloatre, 'Vanishing Trials? An English perspective', 1 *Journal of Dispute Resolution*, 51, (2006).

simply since 2006 (although the commercial court seems to have had an increase in the last year).¹¹

The third chart shows county court trials and small claims hearings [County Courts Trials and Hearings]. This demonstrates the same increasing trend between the mid-1970s to 1990, followed by a decline after 1990, despite the change in jurisdiction between High Court and county courts introduced by the Courts and Legal Services Act 1990. In 2011 there was a 4 per cent fall in the number of cases issued in the county courts continuing the general downward trend. Trial figures (including small claims hearings) in the county courts in 2011 show a fall of thirteen per cent from the previous year and lower than in any year from 2006 onwards.

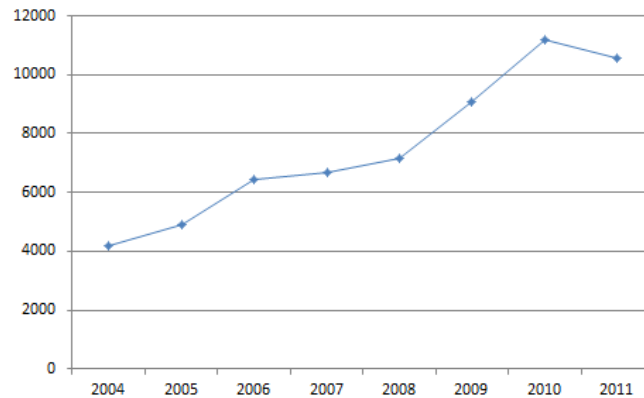


There is no chart but in the High Court Chancery Division, the number of cases issued in 2011 was some 26% lower than in 2008.

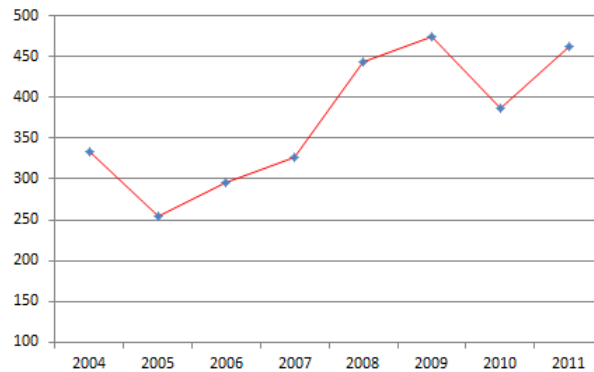
The last two slides, however, show an area of work which has been steadily increasing – that of the Administrative Court which deals with public law citizen/state disputes. I will return to those later. [Criminal trials do not show any decline.]

¹¹ Impossible to make proper sense of the statistics. What is published by HMCTS is absolutely awful. No consistency. No proper analysis or commentary. Can't compare data from year to year.

Administrative Court 2004-11
Permission Applications



Administrative Court 2004-11
JR Determinations



The Vanishing Trial: What we don't know. The bare figures tell us an important story about decline in public use of the courts for the determination of civil disputes, but they leave many open questions that can't be answered because of the poverty of official data on court usage. We do not know much about the case mix, changes in the types of cases being brought, who is bringing cases to court and how and when cases are terminating short of determination. We know nothing about disputes that never come within sight of the court. Most importantly, where have the disputes and trials gone and what is the outcome? We have no reliable figures about settlements, about mediation, arbitration or other private dispute resolution processes [although we know from legal needs studies that there are plenty of legal disputes and that a significant proportion of citizens involved in civil disputes simply abandon any attempt to secure redress¹². We do not have similar data for businesses.] [I have been complaining for 30 years about the need for better data to understand the operation of civil justice in order to support rational justice system policy. I

¹² H Genn, *Paths to Justice: What People Do and Think About Going to Law*, Hart Publishing, 1999; Pascoe Pleasence, Nigel Balmer et al, *English and Welsh Civil and Social Justice Panel Survey: Wave 1*, Legal Services Commission, 2010.

have yet to see any evidence that anyone is listening. I will return to the need for more information toward the end of the lecture and think about what researchers might do to remedy this information black hole.]

In the meantime, and in the absence of any rigorous evidence, how do we explain vanishing public trials and the shift to privatisation? There has been a great deal of interest in vanishing trials in the USA, and a wealth of fascinating academic and practitioner analysis and speculation. Helpful though this is for considering the English context, one needs to be cautious about extrapolating directly from the US experience. Although we are witnessing a comparable trend, and there may be similarities in the underlying causes, there are characteristics of the English context that are quite different from the USA – not least the relative simplicity of a unitary rather than federal court system and a Government that is capable of a single justice policy.

However, what the US ‘vanishing trial’ scholars have charted is a century long slow decline in the number and proportion of cases tried in federal and state courts, followed by a sharp drop during the past thirty years or so.¹³ The decline is steepest in torts and contracts, which have become a smaller portion of all trials. As a result, a growing proportion of trials are in civil rights cases [something that is mirrored in our own statistics] and prisoner petitions, even though these categories apparently are also declining in absolute numbers. One of the preoccupations of those concerned about dwindling trial figures in the USA (and a major difference between the US and the English context) is the loss of jury trials in civil cases leading to a reduction in citizen participation in the justice system with, what is interpreted to be consequent damage to “democratic” processes.

While none of the US scholars claims to have the answer to the puzzle and few think that there is only one answer, there is a degree of consensus about the range of factors that might credibly have led to what is now being seen as the death of trials.¹⁴ There are broadly two categories of push and pull factors. On the push side we have potential litigants being deterred from using the public justice system as a result of delays and court congestion during a period of expanded rights during the 1970s in the US. This, it is argued, increased the attractiveness of settlement and private dispute resolution. Other push factors are said to be a growing reluctance on the part of institutional litigants to expose themselves to the risks of trial; increased costs of litigation for claimants; less experienced judges and lawyers wanting to avoid trial (eroding skills or lack of trial skills development); increasing civil caseloads coupled with resource constraints creating robust case management which reduces trials; and finally, the pressure of criminal business squeezing resources for civil work and thus decreasing civil trials

¹³ Marc Galanter and Angela Frozena, *A grin without a cat: Civil Trials in the Federal Courts*, unpublished paper 2010.

¹⁴ *Ibid.* p

On the pull side in the US, explanations revolve around lawyers being better trained in negotiation skills and thus more able to achieve good settlements; the vigorous promotion and lure of private ADR providers promising cheap, quick, creative settlements, and preserved relationships as compared with the representation of trial as risky, traumatic, slow and expensive. Others speak of the 'turn against law' and demise of the adversary system of trial.

One prominent mediation advocate argues that US society is in a time of transition with a shift in public preference from hard to soft law - "away from trial by the 'ordeal' of court... toward 'private' trials or other legal events for the resolution of our disputes with each other."¹⁵ She sees the shift to mediation as part of a social movement in which parties are increasingly turning to the less 'brittle' justice of mediated solutions in which no one loses and rights claims are visualised as problems in search of win-win solutions.

Although these US explanations have some resonance for the English legal environment, it is possible to suggest some specifically local pressures which may have led to the decline of civil trials in England and the growth of private justice which overlap, but are not identical, with those operating in the USA. I don't claim to have all of the answers and am sure that with such a specialist audience there will be many different views. We could undoubtedly have a vigorous debate about what are the most important factors and if this lecture prompts such a debate, I will regard that as a positive outcome.

At a minimum, in my view, these domestic pressures are as follows:

First, The cost of litigating. The charts I have distributed show a reduction in proceedings being issued and trials taking place from the early 1990s onwards. Even allowing for the change of jurisdiction between the High Court and county courts introduced in the Courts and Legal Services Act 1990, the decline is quite clear. Although we don't have much reliable data about the cost of litigation – and it is notoriously difficult to acquire – there was some evidence in the mid-1990s that the cost of litigating in the High Court at least had become quite high. This was certainly Lord Woolf's argument in his 1994-96 review and it was supported by anecdotal evidence given during his road-shows and some data I collected about 2,000 contested High Court cases from Supreme Court Taxing Office files between 1990-1995 for Lord Woolf's final report.¹⁶ Dusting off what is now close to an ancient historical document, I found some fascinating clues. The study covered tort, contract, and commercial cases and looked at total costs and components of costs in relation to factors such as weight of case, delay and legal aid. Costs information was available only for the winning side, but even so the data showed significant lack of proportion between costs and

¹⁵ Carrie Menkel-Meadow, *Is the Adversary System Really Dead? Dilemmas of Legal Ethics as Legal Institutions and Roles Evolve*, Current Legal Problems,

¹⁶ Hazel Genn, *Survey of Litigation Costs*, Lord Chancellor's Department, 1996.

claim value, most particularly in lower value claims. In around 40% of these cases, the costs on one side alone exceeded the value of the claim.

In general, the costs of commercial and medical negligence cases tended to be higher than other categories of case with Counsel's fees representing between 25% and 18% of total costs, regardless of weight of case. Interestingly, at that time about one third of the cases I reviewed had gone to trial and about one-third of claimants were funded by legal aid (mostly medical negligence, personal injury, professional negligence and judicial review, but interestingly 17% of breach of contract, 29% of Chancery and 18% of QB other cases had legal aid).

It is highly likely that increasing costs for litigants, together with a decline in legal aid and replacement by conditional fee arrangements (since 1990 accelerated since 1999) would mitigate against trial and, on the claimant's side at least, create pressures toward never starting litigation or, at best, early settlement. [Claimant's lawyers operating on CFAs would be much more likely to settle than risk trial.] We can see from the hand-outs that when Lord Woolf started his review of civil justice in 1994 the decline in proceedings was already well established. Any crisis in civil justice at the time was not about court congestion, if anything it was about a turn against the courts (and Government concern about the cost of criminal justice). The effect of the Woolf reforms was to increase costs through case management and pre-action protocols. As Lord Justice Jackson noted in his report on civil litigation costs in 2009, the Woolf reforms increased procedural complexity especially via pre-action protocols. 'The more work the rules require do be done', he said, 'the more it will cost and there is now much more work to be done up front.'" In addition, a fundamental objective of the reforms was to encourage settlement, promote mediation and empower the courts to divert cases to mediation. The combined effect of increased costs and diversionary tactics was simply to accelerate what was a clear existing trend, to the point where the issue of proceedings and the occurrence of civil trials seem to be approaching the point of extinction. I will come back to Lord Woolf's privatisation policy shortly.

A second factor that might explain the decline in court proceedings for the resolution of civil disputes is private provider competition: There has always been some private competition for civil and commercial dispute resolution business. Arbitration and conciliation have been used in England in civil and commercial disputes at least since the 1950s,¹⁷ but the contemporary development of ADR, and in particular mediation, dates back little further than the early 1990s. While a dizzying array of private dispute resolution services exists in England and around the globe,¹⁸ arbitration and mediation are the two most common

¹⁷ For a comprehensive survey of the field see H. Brown and A. Marriott, *ADR Principles and Practice*, 3rd Edition, (Sweet & Maxwell 2011).

¹⁸ C Hodges, *The Costs and Funding of Civil Litigation: A Comparative Approach* (C Hodges, S Vogenauer & M Tulibacka, Hart Publishing 2010).

competitors for the business that was previously dealt with by the judiciary in public courts. There is now a market in private dispute resolution services and the new profession of civil/commercial mediation providers has rapidly placed itself on the map. There are no official data about the volume of mediations, arbitrations or other ADR processes taking place, although provider organizations all talk of increases in caseloads.¹⁹ There are some significant differences between arbitration and mediation in relation to process and justice system policy, and I will therefore deal with them separately.

Arbitration: Arbitration goes back a long way in English legal history. It has been argued that arbitration was an integral part of the informal machinery of dispute settlement which existed alongside the courts of law in 15th century England, settling feuds, making peace and restoring harmonious social relations between disputing neighbours.²⁰

Modern commercial arbitration is national and international big business. While generally categorised as one of the main ADR processes, it is distinctive from most other methods which largely constitute different types of facilitated settlement.²¹ Arbitration is essentially private, specialist adjudication on the merits. While rarely any cheaper or quicker than judicial determination in court, it offers something valuable and different for business disputes. Arbitration procedures and outcomes are regulated by the Arbitration Act 1996. Commercial arbitration is binding and arbitral decisions have very limited opportunities for review by courts. Arbitral decisions are given by specialist decision-makers chosen by the parties. Procedures are subject to the rules of natural justice, but the proceedings and the determinations are private and remain confidential to the parties. So what arbitration offers, which is different from public courts, is specialist decision-makers and, crucially, confidentiality. This means that commercially sensitive information is not in the public domain and determinations do not create precedents. As explained by a magic circle firm to potential clients:

One of the main reasons commercial organisations prefer arbitration to litigation is that arbitration proceedings are private and confidential... As a result, highly valuable or sensitive commercial information does not become public, as it may do in litigation. Confidentiality also avoids the outcome of any dispute becoming public and setting a precedent that can be used by other claimants who may have a similar claim.

¹⁹ ICC Annual reports shows a gradual upward trend in arbitrations; CEDR the largest commercial mediation provider published statistics for 2004 showing an upward trend and a significant increase following Dunnett v Railtrack in 2002.

²⁰ Edward Powell, 'Settlement of Disputes by Arbitration in Fifteenth-Century England', *Law and History Review*, Vol. 2, No. 1 (Spring, 1984), pp. 21-43

²¹ For a comprehensive survey of the field see H. Brown and A. Marriott, *ADR Principles and Practice*, 3rd Edition, (Sweet & Maxwell 2011).

Arbitration legislation is therefore a clear example of the type of reform to the civil justice system that actively promotes the removal of cases from the public arena to the private sector. It has developed from a choice of merchants to, in some cases, a mandatory system which sometimes seems to come very close to ousting the jurisdiction of the courts.²² English commercial arbitration law is seen as attractive not only to domestic parties but internationally and English commercial providers offer their services worldwide.

Mediation: Mediation is a private, confidential, consensual process in which a third party neutral assists disputing parties to reach a settlement. Mediators and the mediation process are unregulated and unsupervised. Settlements are enforceable in contract but are confidential to the parties and information obtained during an unsuccessful mediation cannot be referred to in any subsequent legal proceedings. The principal claims for mediation are generally made by contrasting it with trial. Thus it is presented as cheaper, quicker, less risky, more creative and more harmonious than legal proceedings.

Mediators do not give a decision on legal cases but adopt a problem-solving approach which helps disputing parties to reach a settlement that they can live with. It is seen as offering win-win outcomes in which there are no losers. The cost of mediation is paid by the parties.

Contemporary interest, not to say obsession, with mediation is a global phenomenon. Judiciary, policy makers and some legal practitioners in many different legal cultures and environments have leapt on to the mediation bandwagon with varying motivations. The British mediation movement has had a tremendously effective influence on judicial and Government thinking.²³ Mediators have challenged the value of public courts, the relevance of judicial determination to modern disputes and the legal profession's commitment to representative advocacy. Indeed, we have witnessed a revolution in dispute resolution discourse. At the start of the 21st century, political arguments, judicial speeches and policy pronouncements on civil justice now focus on how to encourage or force more people to mediate, on worrying about why more people aren't mediating, and on promoting the value of mediation to the justice system and society as a whole²⁴. This is a remarkable success story and the root of the movement's rhetorical achievement can be found in its ability to

²² Enforcement of arbitration clauses in consumer contracts?

²³ For an extended account and critique see Hazel Genn, *Judging Civil Justice*, The 2008 Hamlyn Lectures (Cambridge University Press, 2009), Chapter 3.

²⁴ Numerous speeches by leading judicial figures and Government Ministers over the past decade demonstrate the interest in promoting mediation. For example see Lord Phillips of Worth Matravers, 'Alternative Dispute Resolution: An English Viewpoint', Speech, India, 29 March 2008. <http://www.judiciary.gov.uk/>; Lord Justice Clarke, MR 'Speech to Annual Mediation Council Conference', Birmingham, (May 2008) <http://www.judiciary.gov.uk/>; See also the Legal Services Consultation Document, *A New Focus For Civil Legal Aid: Encouraging Early Resolution; Discouraging Unnecessary Litigation*, (DCA, 2004) and the Government Response at <http://www.dca.gov.uk/response-litigation.pdf>, which focused on family cases and 'discouraging unnecessary publicly-funded litigation.' See also on judicial review, V. Bondy, M. Doyle, V. Reid, 'Mediation and Judicial Review – Mind the Research Gap', Sep. 2005, *Judicial Review*, <http://www.publiclawproject.org.uk/downloads/MindResGap.pdf>

communicate simple (if empirically unverified) messages to litigants, the legal profession, the judiciary, and to policy-makers looking to make savings on the justice system bill.

Those who promote mediation generally express a lack of faith in adjudicatory procedure and assume that compromise is always preferable to public judicial determination on the merits.²⁵ And particularly intriguing is the fact that some of the most enthusiastic mediation advocates been the judiciary themselves. Thus a critical third explanation for the decline in trials and increase in private justice might be a judicial turn against adjudication in favour of settlement and the promotion of private justice.

The Judicial turn against adjudication

There can be little doubt that a major catalyst for the development of English civil mediation was the publication of the Woolf Report in 1996.²⁶ Mediation was presented as having the 'obvious' advantage of saving scarce judicial resources as well as a variety of benefits for litigants. Fundamental to the Woolf revolution was the transformation of the civil courts from a justice-dispensing function to a settlement-promotion and diversion function, in the centre of which was private mediation. The courts were given the power to enforce mediation through costs sanctions applied to anyone deemed to have unreasonably refused the opportunity or offer to mediate.²⁷ Pre-action protocols all contain a paragraph requiring parties to consider ADR before commencing court action, and point out that the court may require evidence that the parties considered some form of ADR.²⁸

This judicial commitment to the advancement of mediation was most obviously manifested in the development of English 'Mediation Common Law'. In the years following the implementation of the Woolf reforms senior judiciary set about institutionalising the privatisation of civil justice through the paradoxical development of a body of common law on mediation. Through dicta in cases such as *Cowl*²⁹, *Dunnett v Railtrack*³⁰, and *Hurst v Leeming*³¹ parties have been warned that as a matter of law they are required to consider

²⁵ Judith Resnik, 'Bring Back Bentham: 'Open Courts,' 'Terror Trials,' and Public Sphere(s)', 2010, Law & Ethics of Human Rights, Yale Law School, Public Law Working Paper No. 221. Available at SSRN: <http://ssrn.com/abstract=1710640> or <http://dx.doi.org/10.2139/ssrn.1710640>

²⁶ Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, (HMSO, July 1996); see also Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO) (1995)

²⁷ CPR R1.4 (2) and CPR R26.4: stay of proceedings for settlement at the court's instigation. Part 44 costs discretion. '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.' 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."

²⁸ *Civil Procedure Rules, Rules and Directions. Practice Direction – Pre-Action Conduct*, paragraph 8 http://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct#IDANRA2 . These rules apply to civil litigation and not to family proceedings.

²⁹ *Cowl and Others v. Plymouth City Council* [2001] EWCA Civ 1935.

³⁰ *Dunnett v. Railtrack plc.* [2002] EWCA Civ 2003

³¹ [2001] EWHC 1051 Ch, but judgment given on May 9 2002 after the *Dunnett* decision.

mediation before and during court proceedings, even though a point of law might be at issue,³² and that an unreasonable refusal to mediate, or to withdraw from mediation³³, will lead to costs penalties. Interestingly, a judgment that went somewhat against the tide was that given by our Chair this evening in the case of *Halsey v. Milton Keynes General NHS Trust*.³⁴ In a balanced judgment, Lord Dyson opined that there was no presumption in favour of mediation and doubted whether courts should be forcing unwilling parties to mediate. However, this sceptical approach has been rather undermined by subsequent judicial speeches and decisions, the most recent, this year, holding that a failure even to reply to an offer to mediate could be deemed unreasonable by the court.³⁵

While we can debate the roots of judicial enthusiasm for mediation – exhaustion with adversarial procedures, boredom with the passive role, my favourite being judicial post-modern anxiety about whether there are such things as ‘facts’ any more that are capable of ‘being found’³⁶ – it is undeniable that judicial support for mediation has been a significant factor in the development of mediation services, the raising of public and professional consciousness of mediation, and with it the departure of disputes from the courts.

A final and important factor in the privatisation of civil disputes is State withdrawal from the provision of public dispute resolution services for citizens as a cost saving measure. While some of the interest in mediation has grown out of the failure of common law systems to meet the demand for affordable justice on the part of litigants, Governments around the world have been captivated by the potential of mediation to save justice system expenditure. The quickest way to save money on the civil courts is to drive away business into the private sector. No need for legal aid. No need for judges. No need for courts. It is therefore unsurprising that the campaign for mediation, with its confident promise of cost-saving has been welcomed in many jurisdictions. Certainly, a policy of diverting cases to private mediation is an easier and cheaper option for governments than attempting to fix dysfunctional public adjudication systems. Government interest in promoting and, more importantly, in mandating mediation for civil cases in England has not been a panic response

³² *Royal Bank of Canada Trust Corporation Ltd v Secretary of State for Defence* [2003] EWHC 1479 (Ch). 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’. CEDR ‘Public Sector – A Culture Change?’ Resolutions, Issue Number 23 – summer 2003, at p.6. <http://www.cedr.co.uk/news/resolutions/resolutions32.pdf>

³³ *Leicester Circuits Ltd v Coates Brothers Plc.* [2003] EWCA Civ 290 – withdrawal from mediation is contrary to the spirit of the Civil Procedure Rules (March 2003).

³⁴ [2004] EWCA (Civ) 576.

³⁵ *PGF II SA v OMFS Company and another* [2012] EWHC 83 (TCC); see also the comment by CEDR pointing out that it is dangerous to fail to respond to an offer to mediate. Silence can be interpreted by the courts as an unreasonable refusal to mediate. <http://www.cedr.com/articles/?301>

³⁶ J. Resnik ‘Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III’ *Harvard Law Review* 113 (2000) 924-1038, p 1003.

to overloaded courts – as is the case, say, in Italy.³⁷ As we have seen, there has been a dramatic decline in the number of proceedings issued and the number of trials. The driver for Government has simply been cost-saving - to ease the pressure on the civil legal aid bill and to reduce the demand for civil court and judges at a time when criminal justice system costs have seen exponential growth.

Since the 1998 Labour White Paper *Modernising Justice*, it has been explicit Government policy to reduce the proportion of disputes coming to the civil courts. The 2004 five year justice strategy included a target to reduce civil court hearings by 5%, despite the fact that trial rates in the High Court and County Courts (other than small claims) had already plunged. The key instrument for achieving this target was the encouragement, both in and outside the court structure, of the use of mediation. Government statements have made clear that 'all forms of ADR are accepted to have at least equal validity to court proceedings'³⁸ and if solicitors and clients do not properly consider mediation, they will be required to do so.³⁹

Despite research evidence that willingness to mediate is critical to achieving a settlement at the end of the mediation process, that claimants heavily discount their claims, and that there are financial and other costs to unsuccessful mediation⁴⁰, the enthusiasm of Government and some sections of the judiciary to force people into mediation remains largely undimmed.

The Coalition Government is currently accelerating this trend. In the context of the global financial crisis and the need to save £2billion from the justice budget, they have signalled their intention to slash civil legal aid, close courts and focus policy on alternatives to court. These proposals are accompanied by a new civil justice rhetoric which presents court proceedings as an unnecessary drain on public resources, and legal aid as an incitement to litigate rather than a means of facilitating access to justice.⁴¹ [Interestingly, this view seems

³⁷ Felix Steffek, Hannes Unberath, with Hazel Genn and Reinhard Greger (eds), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, Hart Publishing, 2013

³⁸ *Funding Code Guidance Amendments: 'A New Focus for Civil Legal Aid'*. Non-Family Guidance, Part 7, Alternative Dispute Resolution, (Legal Services Commission, 2005)

³⁹ *Ibid* S.7.6 (6).

⁴⁰ H. Genn, *Central London Pilot Mediation Scheme, Evaluation Report*, (Department for Constitutional Affairs, 1998); L. Webley, P. Abrams and S. Bacquet, *Evaluation of Birmingham Fast and Multi Track Mediation Scheme*, (Department for Constitutional Affairs, 2006); S. Prince and S. Belcher, *An Evaluation of the Effectiveness of Court-based Mediation Processes in Non-Family Civil Proceedings at Exeter and Guildford County Courts*, (Department for Constitutional Affairs, 2006); H. Genn et al, *Twisting Arms*, 2007, *supra*; M. Doyle, *Manchester Small Claims Mediation Scheme Evaluation*, (Department for Constitutional Affairs, 2006); J. Enterken and M. Sefton, *Evaluation of Reading Small Claims Mediation Scheme* (Department for Constitutional Affairs, 2006); S. Prince, *Evaluation of Exeter Small Claims Mediation Scheme*, (Department for Constitutional Affairs, 2006).

⁴¹ "[Legal aid] has encouraged people to bring their problems before the courts too readily, even sometimes when the courts are not well placed to provide the best solutions. This has led to the availability of taxpayer

to be reserved only for domestic litigants since the Ministry has recently developed a concurrent policy of promoting the British justice system and legal services to international commercial enterprises and, presumably, Russian oligarchs] Last year, the Ministry of Justice published another set of proposals aimed at procedure in the county courts.⁴² The paper entitled “Solving Disputes” rejects 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’.” The vision for the new system is one “where many more avail themselves of the opportunities provided by less costly dispute resolution methods, such as mediation – to collaborate rather than litigate” - so not a justice system at all, or at least not one that is concerned with substantive justice. A mandatory mediation system will be imposed so that most cases will be required to go through private mediation before being considered for judicial determination.

The justification for this approach is linked directly to the Woolf Report, reminding us that a fundamental premise of the reforms was that court proceedings are not the best or most appropriate route for civil disputes.

Does any of this matter? What, if any, are the problems? For over a decade private mediation has been presented as the preferred method of handling disputes by Government and some sections of the English senior judiciary. While one can see advantages in mediating and arbitrating cases where parties choose to do so, I am interested in the impact of mass mandated privatisation on the collective interest in the justice system and more broadly on the community. These are rule of law issues which concern the value of public adjudication, the loss of precedent in a common law system, and the unknown consequences of the unregulated processes and substantive outcomes of private dispute resolution. I would like to end with a brief reflection on these issues.

First then, losing the value of adjudication: Reading and listening to mediation enthusiasts, almost inevitably leads to a sense of exhaustion and disillusionment with public judicial determination. It is true that the courts and adversarial procedure have a long way to go before they can guarantee to all those who would bring their cases for determination a modern, efficient and affordable experience that is comparable with procedures in some civilian jurisdictions.⁴³ But we should not lose sight of the value of the courts and adjudication and not take for granted the quality of the judicial system that critically supports private dispute resolution. The credible threat of the coercive power of the state is what brings unwilling parties to the negotiating table. The choice to reject mature, rule of

funding for unnecessary litigation.” MOJ, *Proposals for reform of Legal Aid in England and Wales*, November 2010. <http://www.justice.gov.uk/downloads/consultations/legal-aid-reform-consultation.pdf/>

⁴² MOJ, *Solving Disputes in the County Courts: Creating a Simpler, Quicker and More Proportionate System. A consultation on reforming civil justice in England and Wales*, CP6/2011, March 2011.

⁴³ Felix Steffek, Hannes Unberath, with Hazel Genn and Reinhard Greger (eds), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, Hart Publishing, 2013.

law-rich legal processes is a luxury not available in many jurisdictions around the world where access to expert, professional, independent and incorrupt judiciary is in short supply or may be non-existent.

Adjudication as the public determination of legal rights performs a number of important individual and collective social functions. The *public* function of the civil courts is to provide authoritative statements of what the law is, who has rights and how those rights are to be vindicated. The norms and behaviours contained within the law radiate out from public statements in court and influence the behaviour of citizens in daily interactions. This is part of the public value of courts.⁴⁴ Thus for civil justice to perform its public role, adjudication and public promulgation of decisions is critical. It has been argued, that the ability of disputing parties to make reasoned arguments to an impartial third party represents the essence of adjudication, and such adjudication represents in turn the manifestation of the rule of law.⁴⁵ Moreover, court procedure and judicial decisions are governed by well-developed due process values. Public judgment is reached at the end of hearings which provide formal, tightly structured opportunities for an impartial decision-maker to determine the rights and responsibilities of particular persons, fairly and effectively after hearing evidence and argument from both sides.⁴⁶ This, we believe, goes some way to moderating gross imbalances of power and aspires to achieve just outcomes according to law. Privatized dispute resolution processes (with the possible exception of arbitration) do not have this commitment to process. On the contrary, a critical characteristic is precisely the lack of formal procedure, and its replacement by flexibility, and party-determined processes.

Without scrutiny it is impossible to know whether the processes or the outcomes for parties are fair in the context of the legal rights and responsibilities that gave rise to the dispute. For example, there is evidence that women and minorities fare rather badly in mediation. The Government argues that diverting legal disputes away from the courts and into mediation will increase access to justice – an essential element in the rule of law. But mediation does not contribute to access to justice. It is neither about access to the courts nor about just outcomes. The mediator does not make a judgement about the quality of the settlement. Mediators define a successful outcome as a settlement that the parties ‘can live with’. The outcome of mediation is not about *just* settlement it is *just about settlement* – and private settlement at that. If, as is argued by mediators, the fairness of outcome is not

⁴⁴ Marc Galanter, ‘The Radiating Effects of Courts’, op cit; Department of Justice, Victoria, Australia, *Justice Statement* - Chapter 2.0, ‘Justice and the need for change’ (2004), para 2.3.1.

⁴⁵ Fuller L, “The Forms and Limits of Adjudication” (1978) 92 Harv LR 353; Julian Gruin, ‘The rule of law, adjudication and hard cases: The effect of alternative dispute resolution on the doctrine of precedent’ , (2008) 19 ADRJ 206

⁴⁶ Jeremy Waldron, ‘The Rule of Law and the Importance of Procedure’, Chapter 1 in James E Fleming (ed), *Getting to the Rule of Law*, New York University Press, 2011.

relevant to judgements about the quality of the process, what might be the long term social consequence in terms of public respect for, and compliance with, legal responsibilities?

A second concern is the loss of the opportunity to vindicate rights rather than compromise them: Public adjudication has been described as “a cornerstone of commerce, an essential social service, and a hallmark of civilization”. While those who take this view have been branded “adjudication romantics” by the mediation movement, there are at least some aspects of the value of public courts that should give us pause. It has been argued rather persuasively that in a Lockean sense, *“The vindication of private rights, no less than punishment for wrongs against society, is an essential part of the social compact.”* In assuring individuals that claims of injustice will be heard, considered, and judged on their merits, the courts perform a distinctive service. The belief that claims of injustice will be taken seriously tends to lessen alienation and to foster an awareness of community obligation. “When it is alleged that one member of a community has wronged another, someone must be available to hear both sides and to provide an impartial, authoritative resolution of the dispute.”⁴⁷

The emphasis on diverting as many cases as possible toward private settlement inevitably means the widespread compromise of legal rights. In many cases this may make perfect commercial sense, for example where parties are in a continuing business relationship. But more often, what disputing parties want, empirically, is vindication not compromise; and if they cannot have that, they want a process of losing which they can recognize as fair. Participation in court proceedings can be empowering and many of those who compromise their claims do so because they feel they have no option, rather than as a matter of choice. Jeremy Bentham [whose preserved corpse adorns the front entrance of my University] would have taken a dim view of private dispute resolution.⁴⁸ His ideal was quick, cheap, simple routes to judicial determination in public on the merits, and in his view compromise was a denial of justice.⁴⁹

Bentham saw compromise as the sacrifice of rights that could only be justified as the lesser of two evils. He doubted whether bargaining is ever really equal or consent truly free, and having watched mediations and interviewed parties both before and afterwards, it is clear that outcomes reflect bargaining skills and the balance of power between the parties.

⁴⁷ Albert W. Alschuler, ‘Mediation With A Mugger: The Shortage Of Adjudicative Services And The Need For A Two-Tier Trial System In Civil Cases’, 99 Harv. L. Rev. 1808, 1985-1986

⁴⁸ William Twining ‘Theories of Litigation, Procedure and Dispute Settlement’, 56 MLR, 1993, 380, pp384-5.

⁴⁹ Bentham visualised an ideal court system that offered open, cheap, simple, speedy implementation of the law that would avoid the delays, vexations, and expenses involved in pursuing civil litigation. See A. J. Draper, ‘Corruptions in the Administration of Justice: Bentham’s Critique of Civil Procedure, 1806-1811’, *Journal of Bentham Studies*, 7 (2004).

A further concern about the shifting of disputes into the private sector is the loss of justice performed in public. As Judith Resnik so brilliantly reminds us, Jeremy Bentham believed unquestionably that legal disputes should be determined via public hearings.⁵⁰ In his view, publicity of hearings had at least three values: truth, education and discipline. Bentham thought that giving oral testimony in court was the best way to achieve rectitude of decision through the application of substantive law to true facts.

He also believed that through the vehicle of public trials, judges could communicate important norms to the community. Finally, and perhaps most importantly for this discussion, he believed that publicity was critical for justice – keeping decision-making processes and the judiciary themselves under scrutiny. “Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.”⁵¹

Publicity through the requirements of openness, knowledge and accessibility are fundamental characteristics of the rule of law. Legal rules should be known and their application, public. In privatizing significant sections of the adjudicative function, we are “systematically and knowingly treading on key rule of law protections.”⁵²

And very importantly we come to the loss of common law precedent: The original courts – from which the High Court is a direct descendant – developed in order to solve pressing practical questions – to dispose of arguments, to solve disputes and to suppress violence and theft. Some very basic values and interests have been recognized and developed by the common law in the field of property, contract, tort, theft, and murder.⁵³ Trials provide opportunities for the courts to articulate the law, which is valuable for its own sake, doing justice for the parties and potentially deterring future misbehaviour by the defendant and others. But equally importantly, in efficiency terms, trials can *reduce the number of future lawsuits by clarifying the law*. As has been argued by economists, “A disputed point of law could give rise to lawsuits indefinitely, so long as they all settle. But when a judgment makes clear what behaviour is and is not lawful, that clarity can increase efficiency by directing would-be defendants how to act.”⁵⁴ The reduction in unlawful behaviour represents a significant social benefit. To this extent the civil justice system serves both individual and collective interests. Indeed, the private and public are inextricably linked. Subsidized private litigation can benefit the public, not only by creating benchmarks that promote the settlement of disputes, but also by persuading potential wrongdoers that the

⁵⁰ Resnik, Bring Back Bentham op cit.

⁵¹ William Twining, MLR 1993, op cit.

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⁵³ P. S. Atiyah, *Law and Modern Society*, Oxford University Press, 1983, P2-3

⁵⁴ John Bronsteen ‘ Some thoughts about the economics of settlement’, 78 *Fordham Law Review* (2009) 1129, 1138-9

violation of rights is likely to be unprofitable.⁵⁵

Unfortunately, successive U.K. governments have decided that, “although civil justice may be a public service, it is not a public good....The creation of precedents and the creation of law, through the civil justice system, is not perceived by government as contributing to the general welfare in the same way as state-provided education or health care.”⁵⁶ But the incidental and, in some cases, deliberate avoidance of precedent creation is without doubt a substantial social issue.

It is inevitable that increasing privatisation will lead to fewer precedents and the gradual erosion of the common law. High rates of settlement and diversion of cases to arbitration and mediation are likely, however, to have a differential impact on common law. The erosion of principle will not affect all areas of law equally. In this respect private law, and particularly commercial law, are especially vulnerable. It has been said, for example, that in the fields of shipping and insurance law the prevalence of arbitration is leading to a loss of guidance which results in unnecessary further arbitrations. This is a question worthy of investigation by researchers. On the other hand, as the hand-outs show, public law issues continue to come to court in significant numbers and lead to judicial determinations. So while public law precedent continues to thrive and develop, private law may weaken or wither. An elaborated, granular body of rules in a common law system offers guidance on how to ascertain legal risk. Thin law can lead to uncertainty and risk aversion in the commercial world, so that economic possibilities are not optimised. Moreover, where there is uncertainty, there is fertile ground for disputes to escalate. Instead of indiscriminately driving cases away, perhaps we should be asking what cases should be facilitated into court and how they should be facilitated? Which cases potentially valuable to the development of the law, are not reaching formal determination because litigants are being told or choosing to take their business elsewhere

In what way, then, is all of this a rule of law issue? The Rule of law is a concept that, like access to justice, has been endlessly picked over. It means different things to different people, has many definitions and interpretations. A reasonable starting point is the late Lord Bingham and his impressively accessible book ‘The Rule of Law’. For Bingham, the core of the Rule of Law idea is that all people and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts. Despite the inclusion in his definition of publicly administered courts, Bingham offers a surprisingly thin explanation of the application of the rule of law to civil dispute resolution. He is not alone in this. A common feature of Rule of Law scholarship is a central focus on the law as a restraint on

⁵⁵ Alschuler op cit, p 1817.

⁵⁶ Dingwall, op cit.

state power to the exclusion of consideration of private power and the role of courts in restraining the abuse of private power.

In a departure from the norm, however, Jeremy Waldron draws attention to the importance of due process and courtroom procedure to rule of law discussion. In his view well-functioning public courts are as essential to a legal system as free elections are to democracy. He says:

*"I do not think we should regard something as a legal system absent the existence and operation of the sort of institutions we call courts. By courts, I mean institutions which apply norms and directives established in the name of the whole society to individual cases and which settle disputes about the application of those norms."*⁵⁷

He concludes that "courts hearings, and arguments are aspects of law which are not optional extras; they are integral parts of how law works."⁵⁸

One of the few extended reflections on the rule of law and private power argues that instead of focusing on the rule of law as a constraint on the abuse of state power, we should recognise the role of the state in preventing the abuse of private power. Too great an emphasis on the former aspect of the Rule of Law leads to private law becoming invisible, while administrative law grows [see the final charts in the hand-outs.] Claimants in litigation invoke the coercive power of the state to protect themselves against the tendency of private actors to breach contracts, commit torts, fraud, and act in bad faith. What is wanted from a liberal state that abides by the Rule of Law, is protection against violence, fairness in commercial dealings, and protection from the wrongs that can be perpetrated by more powerful private individuals, corporations or entities.⁵⁹ In the privatised world of dispute resolution you may have *the law* but *it does not rule*. You may not even have the law and certainly you do not have the values of the public justice system.

So, to conclude:

The decline in the use of public court processes and the shift to private, largely unregulated and unscrutinised processes is a trend that cannot easily be stopped even if there was a will to do so. The Government's intention to withdraw from providing public forums for the resolution of civil disputes seems pretty clear and the role of civil courts in dealing with private law disputes is gradually disappearing. The question is whether it matters now and whether it will matter in the future.

There are at least two broad categories of uncertainties that need to be addressed in relation to the phenomenon of vanishing trials and privatisation of civil justice. The first, and probably easier category, involves questions about the processes and outcomes of private services. It has been argued that unregulated, mass private dispute resolution

⁵⁷ Jeremy Waldron, 'The Concept and The Rule of Law', 43 *Georgia Law Review*, Fall 2008, 1-33, p6

⁵⁸ *Ibid* p21.

⁵⁹ Robin West, *The Limits of Process*, Chapter 2 in James E Fleming, *Getting to the Rule of Law*, New York University Press, 2011.

provision is “aberrant”.⁶⁰ The legal system assures quality through judicial selection and training, through procedural rules and a system of appeals. Arbitration is governed by statute which provides protection for parties in relation to arbitrators and offers limited opportunity for review of arbitral awards. But no similar protections exist for parties entering mediation. So in order to judge whether privatisation represents a social benefit it would be useful to know, for example:

- What are the standards and levels of competence in the average private process?
- What is the outcome and experience of users of private dispute resolution?
- What is the immediate and continuing impact on the parties to disputes and is there a differential impact on claimants and defendants? Stronger and weaker parties? Repeat players and one-shotters?

The second and much more difficult area of uncertainty is the longer-term impact of the declining contribution of the civil courts to the development of the law and regulation of social behaviour. For example:

- Is there a perception of a loss of precedent and, if so, what is the effect?
- Are there cases that should be retained within the public sector and, if so, how would we identify them and how would we go about ensuring that they did, indeed, remain?
- What in the long term will the drift to private, confidential compromise and the declining visibility of the courts in private law issues have on confidence in the law and protection of individual rights?

There are many more questions raised by this issue which, I hope, can start to be debated. I do not have the answers, but I am not alone in my concern. The potentially eroding effect of the privatisation of civil justice has been likened to climate change. Something that you can't detect daily or even yearly, but which gradually creeps up on you.⁶¹ What we need is some consciousness of the phenomenon, some debate about its legal and social consequences and some effort, perhaps on the part of socio-legal academics like me, to describe, understand and explain the long-term implications.

⁶⁰ Andrew Boon, Richard Earle and Avis Whyte, 'Regulating Mediators?', *Legal Ethics*, Volume 10, Number 1, 2007, pp. 26-50, at p 33.

⁶¹ Yarrow, *op cit*, p.288